

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY V. WILSON, et al.

Defendants.

Civil Action No. 76-1326

FILED

JUN - 1 1982

MEMORANDUM

JAMES F. DAVEY, Clerk

Plaintiffs brought this action for damages and injunctive relief against the District of Columbia and a number of active and retired members of the Metropolitan Police Department ("MPD") and the Federal Bureau of Investigation ("FBI").^{1/} The amended complaint filed October 28, 1977, alleged that defendants had systematically violated plaintiffs' constitutional rights, individually and through conspiracies, while plaintiffs engaged in lawful protest against government policy in the late 1960's and in the 1970's in the Washington area. Trial of the damages claim began on November 23, 1981, and continued for seventeen days.^{2/} A jury of six returned verdicts, after nearly five days

^{1/} Numerous defendants named in the amended complaint obtained voluntary dismissal of claims against them prior to submission of the issues to the jury. Defendants remaining in the litigation when the case was submitted to the jury are identified infra at 2-3.

^{2/} The parties had pursued discovery for several years, during which time the case was assigned to several judges of this Court. The final trial date had been established in the Pretrial Order filed August 14, 1981.

of deliberation, on December 23, 1981.^{3/} Now before the Court are motions pursuant to Fed.R.Civ.P. 50(b), 59(a) for judgment notwithstanding the verdicts or, in the alternative, for a new trial.^{4/}

I. Introduction

The verdicts the jury returned found most of the defendants liable to plaintiffs and awarded most of the plaintiffs substantial sums in compensatory and punitive damages. The total amount of all awards to the eight prevailing plaintiffs against the 13 defendants found liable to them was \$711,937.50. Three plaintiffs recovered \$81,062.50 each and five recovered \$93,750 each.^{5/} One plaintiff, the Washington Area Women Strike for Peace ("WAWSP"), was found not to have been injured by any defendant, and consequently had no recovery.

The individual defendants found by the jury to be liable to

^{3/} A blank copy of the special verdict form is attached as Appendix I.

^{4/} Consideration of the prayer for equitable relief has awaited disposition of the damages claim in the district court.

^{5/} The three plaintiffs recovering the lesser sum were Tina Hobson, an activist in the anti-war and civil-rights movement in Washington since 1964; David Eaton, a member of the Black United Front who protested against American involvement in the Indochina war; and Reginald Booker, a civil-rights activist who served on the Emergency Committee on the Transportation Crisis ("ECTC"), a local ad hoc citizens' group that inter alia opposed destruction of dwellings in older Washington neighborhoods to make way for new highways. The five plaintiffs recovering the greater sum were Abraham Bloom, an organizer of the Washington Area Peace Action Coalition ("WAPAC"); Arthur Waskow, a fellow of the Institute for Policy Studies ("IPS"), a Washington organization for the study of public policy; Sammie A. Abbott, an anti-war activist and ECTC organizer; Richard Pollock, a former college journalist active in anti-war organizations based in Washington, and for a time an office worker for the People's Coalition for Peace and Justice; and the Washington Peace Center ("WPC"), a permanent organization that seeks to redirect military spending to other uses and that participated through its membership in protests in Washington against the Viet Nam War.

Plaintiff Julius Hobson died prior to trial of the damages claim and his claims were not pursued. Plaintiff ECTC apparently discontinued prosecution of its claims prior to assignment of this case to the trial judge.

one or more plaintiffs included five persons employed at FBI headquarters or the FBI Washington Field Office ("WFO").

Defendant Brennan was a section chief, and later assistant director, of the FBI's Domestic Intelligence Division from 1966 to 1971. Defendant Moore served from 1967 to 1974 as a section chief in the same division as Brennan. Defendant Jones held the post of Security Coordinating Supervisor at WFO from 1964 to 1974. Defendant Grimaldi worked as a special agent at WFO from 1968 to 1970 and defendant Pangburn held a similar position from 1968 to 1972.

The defendants employed by the District of Columbia included former MPD Chief Wilson, former Intelligence Division Inspector Herlihy, and four officers assigned to the Intelligence Division during some of the years when plaintiffs claimed to have been injured. Those officers were defendant Acree, a sergeant at the relevant time; defendant Scrapper, also a sergeant; defendant Suter, then a lieutenant; and defendant Mahaney, then a line officer. The other individual MPD defendants were three undercover officers assigned to the Intelligence Division during the relevant period: defendants Bynum, Jägen, and Markovich.

According to plaintiffs, the FBI defendants collaborated with each other, with other FBI agents, and with the MPD defendants in a variety of efforts to impede plaintiffs' association with others for the purpose of publicly expressing opposition to government policies, chiefly opposition to the Viet Nam War and to policies espoused by national and local officials on race relations. Many of defendants' activities alleged to have injured plaintiffs were related to COINTELPRO, a then-secret FBI activity begun in 1967 and discontinued in the early 1970's. COINTELPRO had two components: COINTELPRO-New Left, which concerned activities of persons opposed to American involvement in the Viet Nam War and other related policies of the national government, and COINTELPRO-Black Nationalist, which

and as more plaintiffs located the persons involved at FBI headquarters on the FBI Building with office (2000).

Defendant's Bureau was a section 501(c)(3) and later defendant's Bureau. At the FBI's Bureau's Intelligence Division from 1955 to 1957, Defendant's Bureau worked from 1957 to 1959 as a section chief in the same division as Bureau. Defendant's Bureau held the post of Bureau's Chief of Security, Confidential Supervisor at FBI from 1959 to 1964. Defendant's Bureau worked as a special agent at FBI from 1964 to 1970 and Defendant's Bureau held a similar position from 1970 to 1975.

The defendant's Bureau was employed by the Bureau of Criminal Investigation, former New York State, former Intelligence Division, former Bureau, and later assigned to the Intelligence Division. During some of the years when defendant's Bureau worked for the Bureau, those officers were defendant's Bureau, a resident of the defendant's Bureau, defendant's Bureau, and a defendant's Bureau, then a time officer. The other individuals who defendant's Bureau worked under cover officers assigned to the Intelligence Division during the defendant's Bureau's Bureau, Bureau, and Bureau. According to plaintiff, the FBI defendant's Bureau worked with each other, with other FBI agents, and with the FBI defendant's Bureau in a variety of efforts to impede plaintiff's association with others for the purpose of publicly expressing opposition to government policies, which opposition to the FBI has not and its policies expressed by national and local officials on race relations. Many of defendant's activities alleged to have impeded plaintiff were related to COINTELPRO, a non-secret FBI activity began in 1957 and discontinued in the early 1970s. COINTELPRO was the computerized, confidential, and which concerned activities of persons opposed to American involvement in the Vietnam War and other related policies of the national government, and COINTELPRO-Klan, which

concerned activities of persons seeking enhancement of civil rights for black persons. According to a memorandum prepared by defendant Brennan and circulated to the other FBI defendants and to agents across the country, COINTELPRO, in its "New Left" dimension, had the following objective:

The purpose of this program is to expose, disrupt, and otherwise neutralize the activities of this group and persons connected with it. It is hoped that with this new program their violent and illegal activities may be reduced if not curtailed.

Plaintiffs' Exhibit 3. The purpose of COINTELPRO-Black Nationalist, according to an earlier memorandum, was inter alia to "[p]revent the coalition of militant black nationalist groups;" the Southern Christian Leadership Conference, then headed by the Rev. Dr. Martin Luther King, Jr., was one of four "primary targets" listed in the same memorandum.^{6/} The memorandum that

^{6/} The memorandum to the field offices announced five goals for the "Black Nationalist" COINTELPRO undertaking:

1. Prevent the coalition of militant black nationalist groups...
2. Prevent the rise of a "messiah" who could unify, and electrify, the militant black nationalist movement...
3. Prevent violence on the part of black nationalist groups...
4. Prevent militant black nationalist groups and leaders from gaining respectability, by discrediting them...
5. ...[P]revent the long-range growth of military black nationalist organizations, especially among youth.

Plaintiffs' Exhibit 2 (emphasis in original).

The memorandum went on to instruct the field offices to develop plans for "counterintelligence action" and to submit them for approval and "field-wide" coordination. See Plaintiffs' Exhibit 2. As part of the program, field offices were to report, every 90 days, on "[a]ny changes in the overall black nationalist movement [including] new organizations, new leaders, and any changes in data" previously obtained by the FBI. Id. An earlier memorandum had similarly informed the field offices that "Black Nationalist" groups had to be watched, and that "[t]he activities of all such groups of intelligence interest to this Bureau must be followed on a continuous basis so we will be in a position to promptly take advantage of all opportunities for counterintelligence and to inspire action in instances where circumstances warrant." Plaintiffs' Exhibit 1.

See generally S. Rep. No. 94-755, Supp. Vol. 3 (Staff Report of Select Committee to Study Governmental Operations with respect to Intelligence Activities). See also note 12 infra (discussing memorandum establishing COINTELPRO-New Left).

unpublished activities of persons appearing in the

pages for black persons. According to a newspaper prepared by

Belmont Bureau and released to the other FBI bureaus and

to agents across the country, (NY 100-100000), in the "New York"

Organization, has the following objectives:

The purpose of this group is to
organize, recruit, and otherwise
assist the activities of this group
and persons connected with it. It is
based and will be a new group
which will be organized in any
or various of the following ways:

Principal: Article 5. The purpose of this group is to

assist, according to an earlier memorandum, was later also to

"to assist the activities of militant black nationalist groups."

The Southern Christian Leadership Conference, then headed by the

Rev. Dr. Martin Luther King, Jr., was one of the "primary

targets" listed in the same memorandum. The memorandum that

the memorandum to the field offices and dated five months later

the "Black Nationalist" Committee memorandum:

1. Assist the activities of militant black nationalist

groups...

2. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

3. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

4. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

5. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

6. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

7. Assist the activities of militant black nationalist groups and

leaders from various organizations, by disseminating these...

had initiated COINTELPRO-Black Nationalist advised the agents to whom it was addressed, "You are urged to take an enthusiastic and imaginative approach to this new counterintelligence endeavor and the Bureau will be pleased to entertain any suggestions or techniques you may recommend." See Plaintiff's Exhibit 1. In addition to testimony there were in evidence some FBI documents indicating that COINTELPRO interfered tangibly with the protest activities of the kind carried on by plaintiffs. See, e.g., Plaintiffs' Exhibit 13 (WFO reporting that FBI distribution of fictitious addresses for housing of demonstrators at 1968 Chicago demonstrations caused "numerous demonstrators" to make "useless trips to locate non-existent addresses."); Plaintiffs' Exhibit 69 ("security squad Buagents" supervised by defendant Jones instituted "an intensive interview program in the New Left community . . ." which "produced tangible results in the disruption of the day to day activities in the New Left communes . . ."). At trial, plaintiffs asserted, and the jury evidently was persuaded, that plaintiffs were victims of three conspiracies, actionable under 42 U.S.C. § 1985(3), to violate their civil rights. One such conspiracy, the jury found, included the five FBI defendants; another encompassed certain of the MPD defendants; and a third involved both FBI and MPD defendants. The jury also found that many of the defendants, acting outside the scope of any conspiracy, injured various plaintiffs in the exercise of their First Amendment rights. The First Amendment rights plaintiffs alleged had been violated included the opportunity to assemble for political protest, to associate with others in order to engage in political expression, and to speak on public issues, free of unreasonable government interference. Plaintiffs offered evidence of broad undertakings by defendants to disrupt their activities and of specific instances in which FBI and MPD action allegedly impeded those activities.

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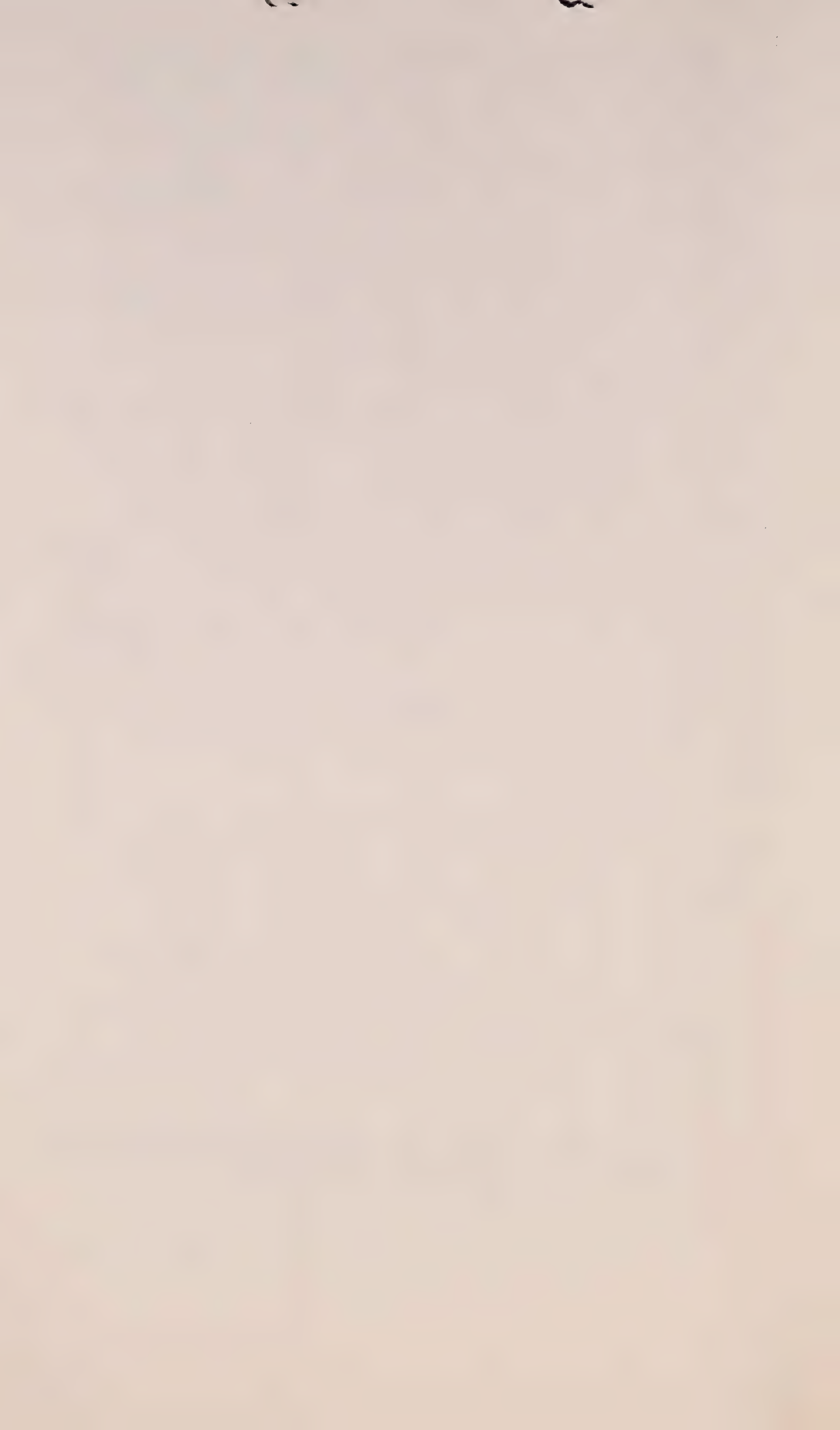
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Only two defendants, Bynum and Markovich, were found to be not liable to any plaintiff. Having determined that the other defendants were liable on various claims, the jury awarded varying sums to the prevailing plaintiffs against those defendants. The jury found all defendants other than Markovich and Bynum liable to plaintiffs Bloom, Abbott, Pollock, Waskow, and WPC. The jury also returned verdicts for plaintiffs Hobson, Eaton, and Booker against the five FBI defendants but, among the MPD defendants, only against former Chief Wilson and former Inspector Herlihy. All defendants except the District of Columbia and MPD officer Mahaney were found to be liable for both compensatory and punitive damages.^{7/} The largest judgment against any individual defendant was that awarded against defendant Brennan, whom the jury found personally liable for \$9,375 to each of the eight prevailing plaintiffs, for a total of \$75,000 of which \$50,000 was compensatory, and \$25,000 punitive, damages. The jury returned the smallest award against defendant Mahaney, who was found liable to five plaintiffs for \$1,875 each, for a total of \$9,375, all compensatory. Every prevailing plaintiff recovered \$37,937.50, all compensatory, from the District of Columbia.^{8/}

In their present motions for relief from the verdicts, the defendants found liable to various plaintiffs state numerous grounds for judgment notwithstanding the verdict ("judgment n.o.v.") and for a new trial. Defendants assert that the instructions on conspiracy and on the defense afforded by the statute of limitations were erroneous, and that even if the instructions were correct, the jury improperly found conspiratorial liability and improperly denied them relief from

^{7/} In each instance in which the jury awarded punitive damages against a defendant to a particular plaintiff, the punitive award was one-half the amount of compensatory damages.

^{8/} See chart on p. 52 infra.



plaintiffs' claims under the statute of limitations. Defendants also assert that the damages awarded were excessive, and that the Court erred in not instructing the jury that the United States would not pay an award against the FBI defendants. The District of Columbia objects to the instructions on municipal liability, and, assuming arguendo the instructions were not erroneous, to the verdicts the jury returned against it. And all defendants also claim that the verdicts against them for conduct allegedly performed outside the scope of the alleged conspiracies similarly were not supported by the evidence. There are numerous other objections in defendants' motions.^{9/} Each plaintiff also has sought judgment n.o.v. against defendants Bynum and Markovich, and plaintiff WAWSP seeks judgment against all the other defendants as well as Bynum and Markovich.^{10/} For the reasons stated below, the Court will deny all motions, except the motion of defendants Wilson and Herlihy for relief from the jury's award of punitive damages.

II. The Instructions and Proof of Liability

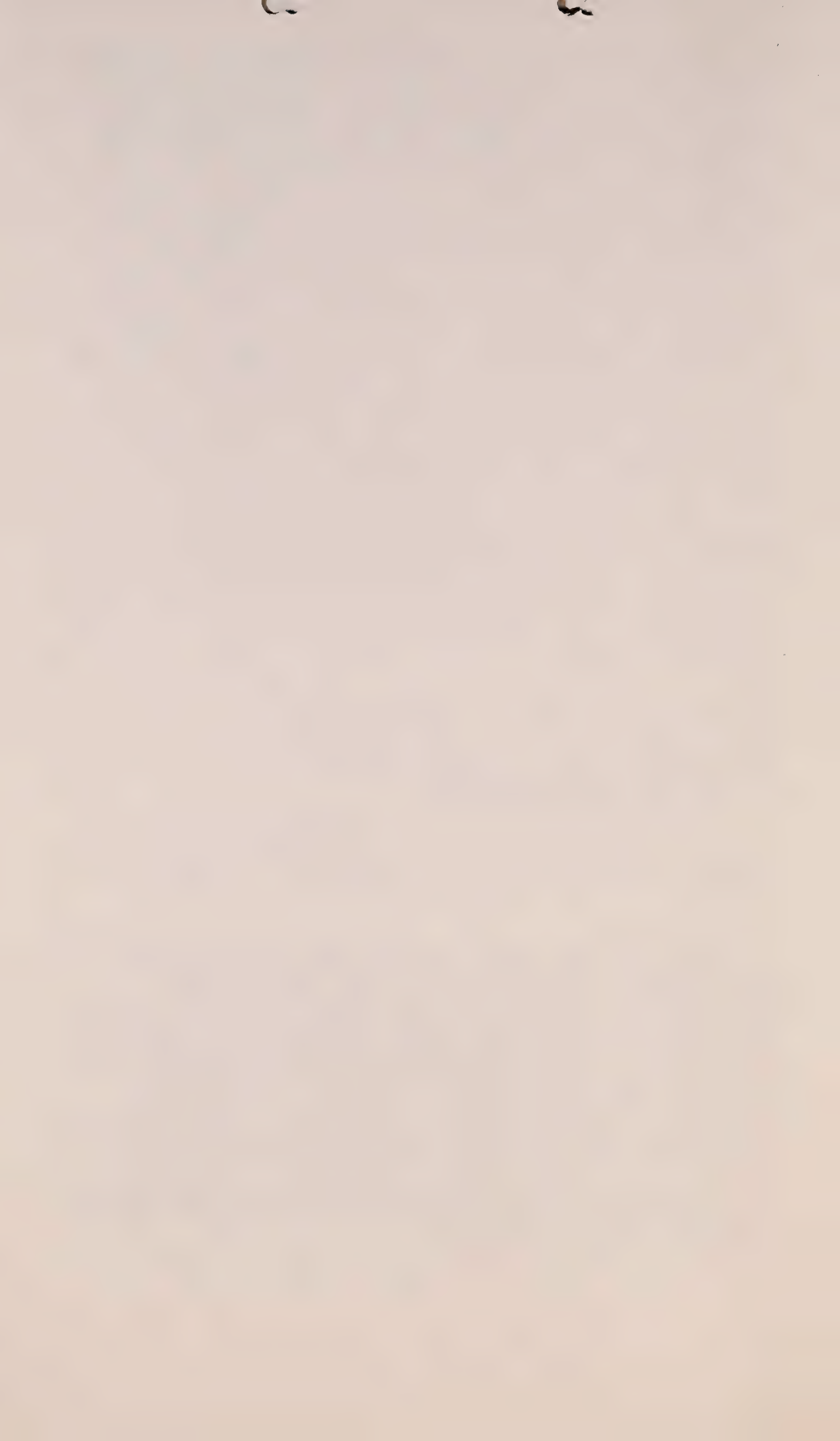
A. Liability under 42 U.S.C. § 1985(3)

1. The Conspiracy Instructions

In their motion for a new trial the District of Columbia defendants renew their argument, first advanced at a

^{9/} Defendants also assert that the Court's special verdict form was prejudicial or confusing; that the Court's rulings on admissibility of certain FBI records and documents were prejudicially erroneous; that the evidence, even if it required an instruction on punitive damages, did not support the jury's determination that they should be awarded; and that a new trial is required because the Court denied a motion for mistrial based upon defendants' discovery of an allegedly improper contact between one of plaintiffs' counsel and members of the jury. Defendant Jones argues that he is entitled to relief because the Court denied various motions that would have dismissed claims against him or granted him a separate trial at a later date.

^{10/} There also remains a motion for sanctions against defendant Markovich for an alleged violation of the discovery obligations imposed by Fed.R.Civ.P. 37(d).



pretrial conference and in their pretrial brief, that employees of the District cannot be liable as "persons within any State or Territory" under the terms of 42 U.S.C. § 1985(3). Defendants rest their argument on the interpretation of 42 U.S.C. § 1983 in District of Columbia v. Carter, 409 U.S. 418, 420-24 (1973), in which the Supreme Court held that District employees did not in the course of their official duties act---for purposes of 42 U.S.C. § 1983---under color of law of "any State or territory" so as to make their conduct actionable under section 1983.^{11/} This action is based, however, on section 1985(3). The conspiracies that are actionable under 42 U.S.C. § 1985(3) exist whether or not the participants act under color of any official authority. The Carter decision, which did not require construction of the geographical terms of section 1985(3) that are at issue here, is wholly immaterial to this case. See District of Columbia v. Carter, supra, 409 U.S. at 421-424; cf. Hurd v. Hodge, 334 U.S. 24, 31 (1948) (construing language identical to section 1985(3) in 42 U.S.C. § 1982). Hurd v. Hodge controls the question here. It would indeed be anomalous if private discriminatory conduct enjoyed a geographical immunity simply because it occurred in the nation's capital. Cf. Hurd v. Hodge, supra, 334 U.S. at 31. Accordingly, defendants' motion on this issue cannot be granted.

Defendants also assert now, as they did at trial, that there was no evidence of "class-based discriminatory animus" to justify an instruction on liability under 42 U.S.C. § 1985(3). Griffin v. Breckenridge, 403 U.S. 88, 96-104 (1971), established the basic elements of conspiracies actionable under section 1985(3). The proof of a conspiracy to violate civil rights is often circumstantial, and determination of the ultimate factual

^{11/} Congress, in Pub.L. No. 96-170, amended section 1983 in 1979 to limit the Carter decision. See 93 Stat. 1284; [1979] U.S. Code Cong. & Admin. News 2609.



questions of intent is peculiarly within the province of the jury. Adickes v. S.H. Kress & Co., 398 U.S. 144, 175-88 (1970) (Black, J., concurring in the judgment). The District of Columbia defendants appear, however, to argue that it was error to instruct the jury on section 1985(3) because the alleged conspiracy was not based on racial animus. See generally Griffin v. Breckenridge, supra, 403 U.S. at 102 n.9. Passing for the moment the question whether there was sufficient evidence for the verdicts that the jury returned, it is long past dispute that section 1985(3) does not require that the targets of the conspiracy be members of a particular racial group. That principle has been clear at least since Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930 (1975). The cases now make it plain that it is the agreement vel non among the alleged conspirators to single a particular group or class for discriminatory interference with constitutional rights that should itself define the class for purposes of section 1985(3). If a conspiracy actionable under section 1985(3) does exist, it will have defined for itself the group or class of persons it intends to victimize. See Scott v. Moore, 640 F.2d 708, 718-19 (5th Cir. 1981); cf. Kimble v. McDuffy, 648 F.2d 340, 346-47 (5th Cir. 1981) (en banc); see also Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d. 711, 719 n.15 (9th Cir. 1981) (collecting cases). See generally Hampton v. Hanrahan, 600 F.2d 600, 624 (7th Cir. 1979), cert. denied on these grounds, rev'd in part on other grounds, 100 U.S. 1987 (1980). In this case plaintiffs offered, as proof of conspiratorial consensus defining the target classes, FBI memoranda launching COINTELPRO and directing agents' attention to "New Left" and "Black Nationalist" political associations, as well as testimony of



participants in the FBI program.^{12/} Plaintiffs also examined the MPD defendants on the criteria explicitly used by the Intelligence Division to identify targets for the Division's activities, and they closely questioned the MPD defendants on the implications of those criteria. There was substantial evidence from which the jury could have found that the alleged conspiracies targeted plaintiffs as opponents of the Viet Nam War or proponents of racial justice. Accordingly, the Court could not have kept plaintiffs' claims of conspiracy from the jury. See Adickes v. S.H. Kress, supra; Hampton v. Hanrahan, supra.

Conceding arguendo that the conspiracy issues had to be put to the jury, the FBI defendants raise specific objections to the content of some of the conspiracy instructions. One of their objections is that the Court incorrectly defined "overt act." The Court defined "overt act" using the familiar standard

^{12/} An FBI memorandum written by defendant Brennan on May 9, 1968, proposing that the Bureau establish what became COINTELPRO-New Left, described the objectives of the program in this way:

"Our Nation is undergoing an era of disruption and violence caused to a large extent by various individuals generally connected with the New Left. Some of these activists urge revolution in America and call for the defeat of the United States in Vietnam. They continually and falsely allege police brutality and do not hesitate to utilize unlawful acts to further their so-called causes. The New Left has on many occasions viciously and scurrilously attacked the Director and the Bureau in an attempt to hamper our investigation of it and to drive us off the college campuses. With this in mind, it is our recommendation that a new Counterintelligence Program be designed to neutralize the New Left and the Key Activists. The Key Activists are those individuals who are the moving forces behind the New Left and on whom we have intensified our investigations.

Plaintiffs' Exhibit 3. See also Plaintiffs' Exhibits 1, 2 (COINTELPRO-Black Nationalist). The significance of the COINTELPRO directives and definitions for defendants' motion for judgment notwithstanding the verdicts on the conspiracy claims is considered at pp. 14 - 15, infra.

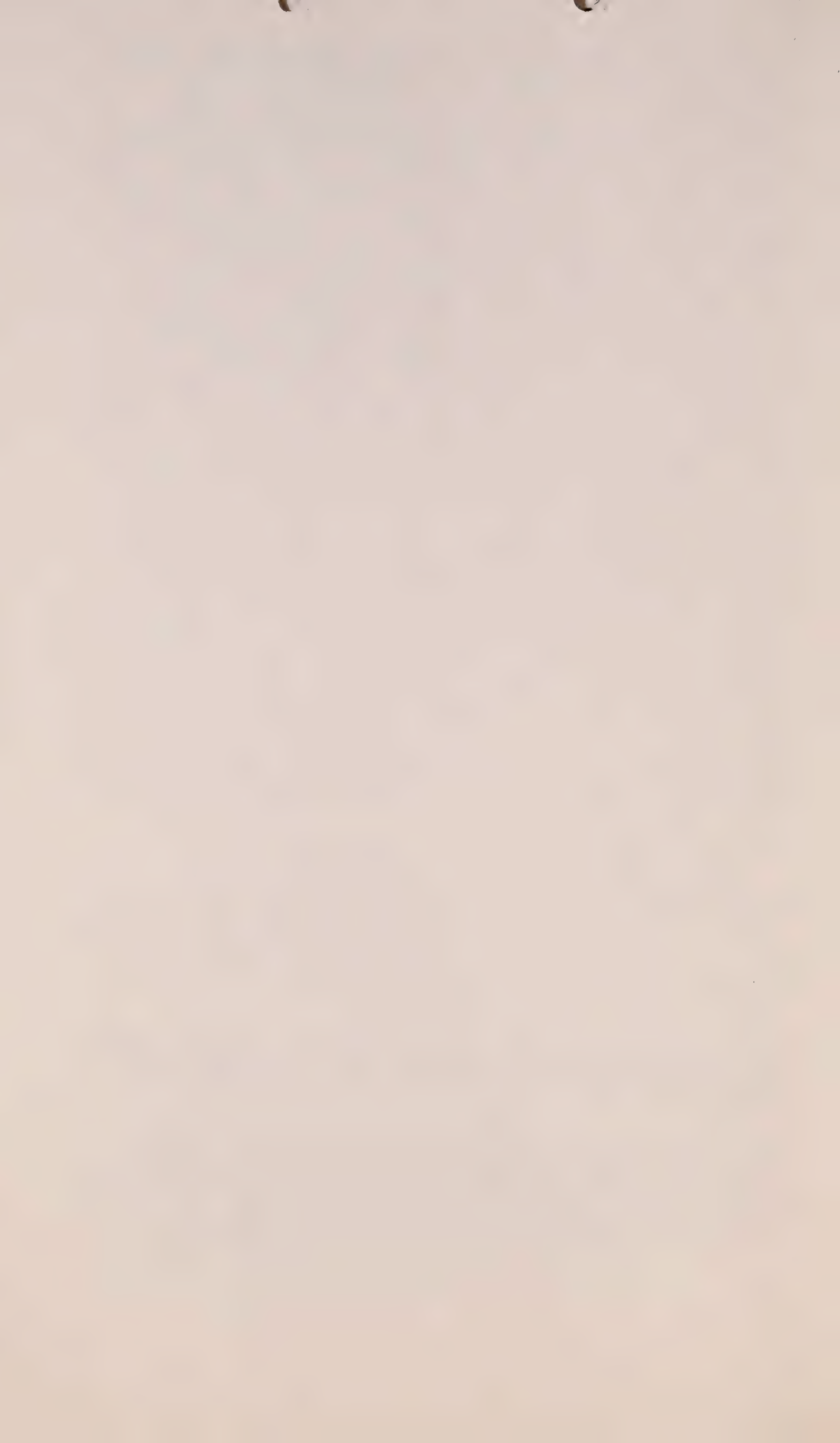


instruction in the District of Columbia "Red Book."^{13/} As the FBI defendants correctly observe, a recovery under section 1985(3) may be had only if a plaintiff suffered an injury as a result of an act taken in furtherance of the conspiracy. See 42 U.S.C. § 1985(3) (" . . . the party so injured or deprived may have an action for the recovery of damages occasioned by such injury"); cf. Edwards v. James Stewart & Co., 82 U.S.App.D.C. 123, 125, 160 F.2d 935, 937 (1947); Fitzgerald v. Seamans, 384 F.Supp. 688, 693 (D.D.C. 1974), rev'd on other grounds, 180 U.S.App.D.C. 75, 553 F.2d 220 (1977). Nevertheless, proof of the agreement itself, as distinct from compensable injury, may derive from evidence of acts done by conspirators, whether or not the act caused an injury that would be actionable under section 1985(3). See, e.g., Hampton v. Hanrahan, supra, 600 F.2d at 624.^{14/} Thus when the FBI defendants contend that the Court erred in failing to instruct that "the overt act which makes the conspiracy actionable must have caused actual injury to the person, property or rights of the plaintiff," they presumably mean to assert that the Court failed to instruct the jury that an overt act in furtherance of the conspiracy must have injured the plaintiff, if that plaintiff is to have a recovery for that injury under section 1985(3).

The FBI defendants have not fairly read the Court's instructions. The Court instructed the jury that "the defendant must . . . have been proved by a preponderance of the evidence to have been a member of the conspiracy at the time the co-

^{13/} The Court thus advised the jury, "An 'overt act' is simply any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy."

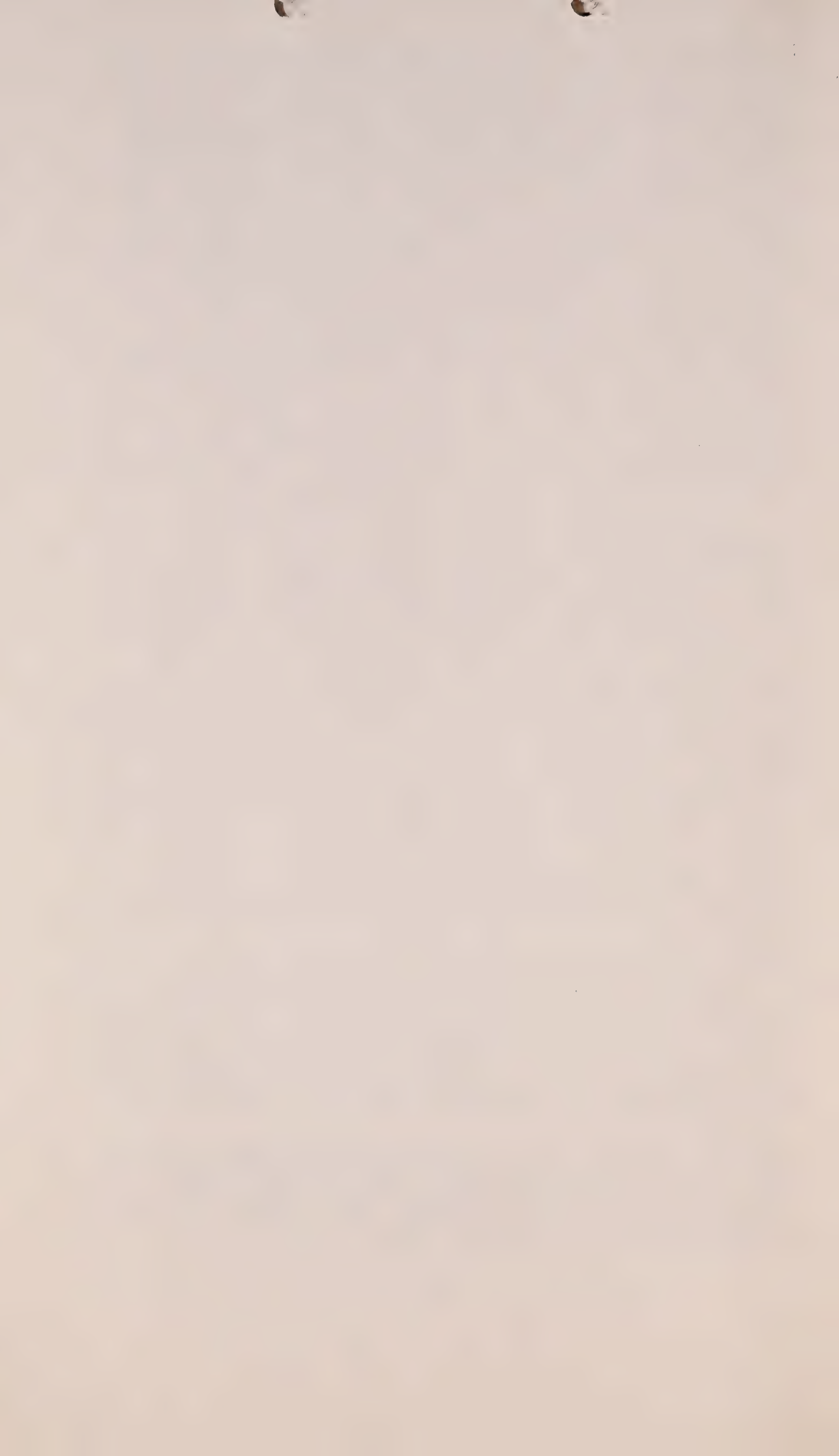
^{14/} In this case, for example, plaintiffs offered extensive evidence of defendants' efforts to maintain secrecy regarding various FBI and MPD operations. While that conduct would not be actionable under section 1985(3), proof of it could have assisted the jury in assessing the character of the alleged conspiracies. See Hampton v. Hanrahan, supra, 600 F.2d at 622.



conspirator acted to injure the plaintiff in furtherance of his or her conspiratorial agreement."^{15/} Any question in the jury's mind that only acts in furtherance of the conspiracy causing injury were compensable must have been put to rest by the Court's subsequent instruction that liability would depend upon proof that "the act causing injury was committed by some one or more of [the] defendant's co-conspirators," if it had not been committed by the defendant himself. The separation of the basic definitions of the civil conspiracy from the elements of proof of liability in the instructions was merely a function of the fact that a Court's instructions, like any other exposition, can only address one point at a time. "The impact of a jury instruction 'is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given.'" Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-57 (1967) (quoting Seaboard Air Line Ry. v. Padgett, 236 U.S. 668, 672 (1915)). The instructions here introduced all the major terms the jury needed to apply, including "overt act," and then led the jury through the order of proof of the various claims and defenses. No juror who followed the Court's instructions could have conscientiously returned a verdict on the conspiracy theory for a plaintiff unless the juror believed that the plaintiff had proved that he or she had been injured by an act taken by a defendant or some other co-conspirator in furtherance of the conspiracy.

Defendants' second objection to the conspiracy instructions is that the instructions permitted the jury to find a defendant liable under section 1985(3) without having found him to possess the Breckenridge "discriminatory animus." That objection, too,

^{15/} The verbatim transcript of most of the proceedings in this case, including instruction of the jury, has not now been filed in the record. Quotations from the instructions in this Memorandum are drawn from the Court's notes, and are believed to match the instructions given the jury.



involves an implausible reading of the instructions. The instructions, incorporating the familiar principles of general civil-conspiracy doctrine,^{16/} explained to the jury that "the participants in a conspiracy share the same general conspiratorial objective: there exists a meeting of the minds which creates an understanding to achieve the conspiracy's objectives. Thus all participants know the common plan; each knows the conspiracy's essential nature and general scope." The instructions then defined a conspiracy actionable under section 1985(3) as one in which "the conspiracy discriminated with hostile intent against a group or class to which plaintiff belonged, with a view to singling out that group or class" for interference with its members' rights under the Constitution.^{17/} Under those instructions, the raison d'etre for the conspiracy was discrimination "with hostile intent against a group or class to which plaintiff belonged," and to find a defendant liable for the conspiracy, the jury had to find that that defendant knew and agreed to the "general conspiratorial objectives." While the instructions did state that a plaintiff must prove that "the conspiracy discriminated with hostile intent," a person could not have been in the conspiracy, according to the instructions, unless he agreed to the "general conspiratorial objectives." The jury could not, under these instructions, have thought "the conspiracy" to be capable of some distinct "hostile intent" not shared by those who had formed the conspiracy and defined its objectives, inasmuch as a conspiracy is simply an agreement among individuals to act together in particular ways. Thus defendants' second attack on the

^{16/} See Hampton v. Hanrahan, supra, 600 F.2d at 620-23.

^{17/} The relevant concept of discrimination itself was explained to the jury as an objective, on the part of the conspiracy, to single out the class or group "for interference with its rights, equal to that of the general public, to assemble or associate for political purposes."



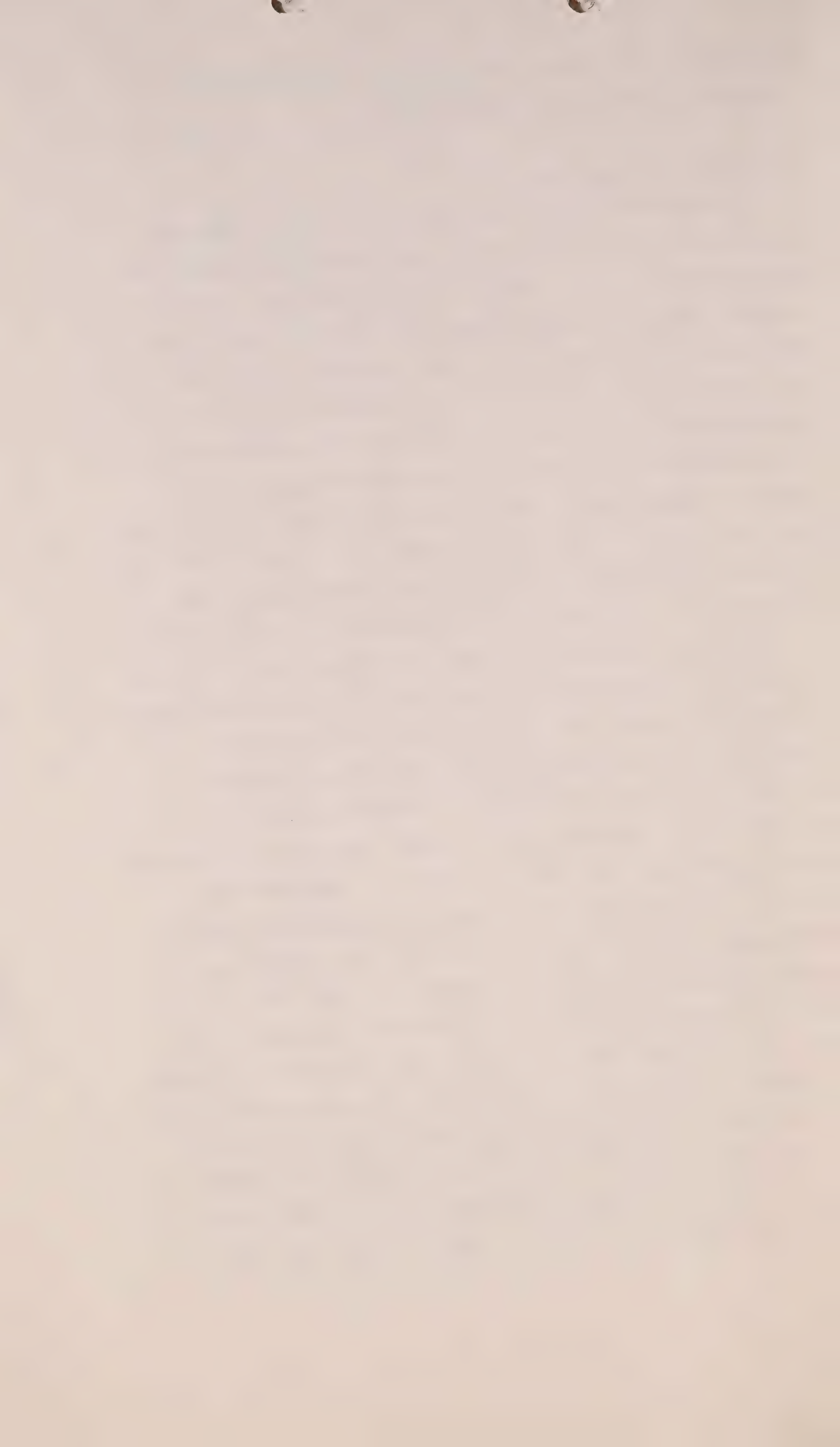
conspiracy instructions, like the first, has no basis in a reasonable reading of the instructions.

2. The Conspiracy Proof

Defendants argue that they are entitled to judgment n.o.v. on the conspiracy issues. The evidentiary criteria for grant of judgment n.o.v. match those for grant of a directed verdict. Murphy v. United States, 653 F.2d 637, 640 (D.C.Cir. 1981). Neither form of relief from a determination of the facts by a jury is appropriate unless "the evidence, together with all reasonable inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict." Vander Zee v. Karabatsos, 191 U.S.App.D.C. 146, 149, 589 F.2d 723, 726 (1978), cert. denied, 441 U.S. 962 (1979). In this case, defendants' view of the jury's verdicts, and the evidence upon which the verdicts were based, is not persuasive.

Defendants' principal argument for judgment n.o.v. is that the evidence demonstrated that they were simply law-enforcement officers performing their duties within relatively small, closely-knit organizations: the MPD Intelligence Division, the WFO, and the FBI headquarters unit. Undoubtedly the fact that defendants were co-workers within various police and intelligence organizations would not alone establish the conspiratorial liability the jury found. Cf. Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 70-72 (2d Cir. 1976); Rackin v. University of Pennsylvania, 386 F.Supp. 992, 1005 (E.D.Pa. 1974). Yet is it also possible for officers belonging to the same law-enforcement unit to conspire among themselves to engage in conduct denounced by the Civil Rights Act and actionable under section 1985(3). See Hampton v. Hanrahan, supra, 600 F.2d at 621, 623-24; cf. Rackin v. University of Pennsylvania, supra.

In the present case, plaintiffs introduced substantial documentary evidence of close coordination within WFO, and



between WFO and other FBI units, including headquarters, to disrupt and discredit individual and group protest activities the agents believed to be part of the "New Left" or "Black Nationalism." The evidence of that concerted activity indicated that, consistent with FBI practice, individual agents exercised considerable discretion and initiative, subject to higher authorities' approval, in planning and working together to disrupt protest activities in which plaintiffs were involved. There was also evidence of a similar pattern of activity among the MPD defendants, though the evidence concerning MPD activity was less extensive than that regarding the FBI.^{18/} Moreover, plaintiffs introduced evidence of regular contacts between supervisory personnel of the Intelligence Division, including some defendants, and WFO agents engaged in COINTELPRO activities. On the other hand, MPD defendants denied at trial any recollection of participation by them in any concerted illegal activities with the FBI, and all the defendants indicated that whatever they did to obstruct plaintiffs' activities was assumed by them to be specifically required by their orders from higher officials.

Passing for the moment the question whether defendants were entitled to official immunity,^{19/} and addressing only the character of their action as conspiracy vel non, the motions for judgment n.o.v. are not well-taken. The Court instructed the jury that "the fact that the individual defendants were engaged in law enforcement work in particular agencies of the F.B.I. and the police department is not, standing alone, proof of a conspiracy, nor does that fact preclude the existence of a

^{18/} According to testimony of some witnesses, the Intelligence Division operated without extensive written guidelines and without recording all its activities in written reports, and many records that did exist were destroyed in the 1970's.

^{19/} See pp. 32 - 36 infra.



conspiracy between some or all of them." That instruction was delivered at defendants' request. Only by impermissibly weighing the evidence could the Court now overturn the verdicts that built upon that instruction. Plaintiffs adduced documentary evidence and live testimony of wide-ranging long-term efforts by all the defendants to disrupt plaintiffs' political activities. Evidence of express agreements to violate plaintiff's constitutional rights was, predictably, absent from plaintiffs' case, for the most part. But direct evidence of an agreement to achieve a particular purpose need not be present. Cf. Vander Zee v. Karabatsos, supra, 191 U.S.App.D.C. at 150, 589 F.2d at 727 (contract formation); see also Adickes v. S.H. Kress & Co., supra (civil conspiracy).

How much a particular defendant may have known of the overall design to violate First-Amendment rights was critical to plaintiffs' case. Defendants denied knowledge of any conspiracy or scheme to disrupt lawful protests. There was evidence, including key documentary evidence, to the contrary. The scope of a defendant's knowledge of arrangements existing between other persons must often be deduced from circumstantial evidence. If the inferences the jury has drawn from that evidence are reasonable, then the verdict must stand. Cf. Boutros v. Riggs Nat'l Bank, 655 F.2d 1257, 1259-60 (D.C.Cir. 1981). Particularly is this so when the evidence did show without contradiction that defendants were positioned in organizations where oral and written information was required to move up and down and to and from them in a chain of command, as a matter of course. Cf. Hampton v. Hanrahan, supra. In light of this and similar evidence the Court cannot disturb the jury's judgment on the issue of conspiratorial liability.



B. Liability based upon non-conspiratorial conduct

Plaintiffs also alleged that individual defendants engaged in conduct proximately injuring plaintiffs that was not part of a conspiratorial design. The jury returned verdicts for most of the plaintiffs upon that theory of non-conspiratorial liability, and defendants found liable on that theory now seek judgment n.o.v.

Many of the defendants held supervisory positions within the MPD or the FBI. As supervisors they had authority to direct the conduct of other agents and line officers, informants, and so-called agents provocateurs. In order to be held accountable in damages for the action of a subordinate, however, the supervising officer must have so exercised his authority as to have made his own conduct a proximate cause of the injury suffered by the victim. See Owens v. Haas, 601 F.2d 1242, 1245-47 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980); cf. Monell v. Department of Social Services, 436 U.S. 658, 694 n.58 (1978); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978); Carter v. Carlson, 144 U.S.App.D.C. 388, 393-95, 447 F.2d 358, 363-65 (1971) rev'd. on other grounds, 409 U.S. 418 (1973); Tate v. District of Columbia, Civil Action No. 81-846 (D.D.C., Oct. 26, 1981) (Greene, J.). The instructions so stated.

When the defendants moved for a directed verdict at the close of plaintiffs' evidence, the Court, without objection from plaintiffs, granted the motions of ten of them, most of whom were present or former MPD officers. There was evidence, however, that all of the other defendants played a role in the program of harassment and disruption outlined by plaintiffs' evidence, and the evidence of their personal involvement, beyond the scope of what could properly be considered a conspiratorial plan or agreement, was not so insubstantial that it could be taken from the jury. The evidence against the defendants left in the action after the motion for a directed verdict was in some instances largely circumstantial. Defendant Mahaney, for example, an MPD officer who coordinated activities of the undercover agents Bynum



and Markovich, was found liable to some plaintiffs even though Bynum and Markovich were found not liable to the same plaintiffs. There was evidence, however, that other MPD undercover activity injured plaintiffs, and the jury could have inferred that Mahaney had a supervisory role in that other injurious activity. Plaintiffs' case against FBI defendant Pangburn also was to a large degree circumstantial. Pangburn was found liable to all the prevailing plaintiffs, even though he appears to have worked principally in the so-called "Racial Matters" dimension of COINTELPRO. The jury nonetheless returned verdicts against him in favor of plaintiffs with no direct involvement in Pangburn's own civil-rights target groups. But those verdicts were supported by evidence that the disruption of the civil-rights movement, and the somewhat successful effort to discourage civil-rights activists from participation in anti-war protests, impeded plaintiffs engaged in either activity from free exercise of their First-Amendment rights. The Court's task is at an end if it can discern any permissible theory of liability upon which the jury may have relied; the evidence upon which that theory may have been based need not be "strong." Murphy v. United States, supra, 653 F.2d at 646. The plausibility of plaintiffs' theories of liability and the credibility of the evidence for and against those theories are ultimately the business of the trier of fact.^{20/} The motions for judgment n.o.v. on the jury's findings of non-conspiratorial liability cannot be granted.

^{20/} Defendants appear not to argue that the jury failed to distinguish between conspiratorial and non-conspiratorial liability in making its findings; defendants do, however, argue that plaintiffs recovered more than once for the same injuries and that the damages therefore are excessive. The latter problem is discussed infra at pp. 53-54. Even if defendants did argue that the jury found the same acts to be chargeable under both the conspiratorial and non-conspiratorial theories of liability, their attack would fail. There is no reason to doubt that, in finding liability on both types of theory, the jury first determined the scope of the conspiracy, and then determined whether there were any injuries caused by a defendant's conduct that was unconnected to participation in the conspiracy.

C. Municipal liability

The District of Columbia, arguing that it could not have been liable on any theory to the plaintiffs, challenges the verdicts that the jury returned against it. According to defendant, the District of Columbia government "cannot be held liable under the theory of respondeat superior." Defendant's statement is undoubtedly correct. See Monell v. Department of Social Services, supra, 436 U.S. at 691. But the Court did not instruct the jury in a manner permitting recovery under respondeat superior. The instructions informed the jury that plaintiffs could recover damages from the District government only if an employee causing injury acted "in execution of the District's laws, policies, or customs;" those "policies or customs," as the Court explained, had to be "policies or customs that are made by its law-makers," or "policies that are generally enforced by District employees in the community with the implicit approval of the District government." Since the decisions in Monell v. Department of Social Services, supra, and Owen v. City of Independence, 100 S.Ct. 1398 (1980), the principle of municipal liability for constitutional torts has had a firm basis.^{21/} There is no basis in this case for distinguishing the

^{21/} Monell v. Department of Social Services, supra, overruled Monroe v. Pape, 365 U.S. 167 (1961), insofar as Monroe had held that local governments were not among the "persons" whom 42 U.S.C. § 1983 subjects to civil liability. In Monell the Court established that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694. In Owen v. City of Independence, supra, the Supreme Court rejected a construction of section 1983 that would have allowed municipalities a qualified "good faith" immunity from liability for constitutional violations. Noting that section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations," the Supreme Court concluded that its rule also "harmonizes well with developments in the common law," and suggested that municipal liability without "good-faith" immunity was essential to assure the "innocent individual who is harmed by an abuse of governmental authority . . . that he will be compensated for his injury." 100 S.Ct. at 1416, 1418-19.

rules established in Monell and Owen for section 1983 municipal liability from those governing the liability of the District of Columbia in non-statutory constitutional litigation. The District's employees may be liable under a Bivens theory, and the rules governing their liability are generally to follow those existing under the statutory remedy. Cf. Dellums v. Powell, 184 U.S.App.D.C. 324, 333, 566 F.2d 216, 225 (1977), cert. denied, 438 U.S. 916 (1978). The District should be exposed to the same municipal liability, and have the benefit of the same limitations on that liability, as that attaching to other city governments.^{22/}

Defendant does not even appear in its motion for relief from the verdicts to press the argument that its liability should be different from that existing under Monell because its employees were not, prior to 1979, liable under section 1983. Instead, the District argues that the "evidence adduced by plaintiffs in this suit" was simply insufficient to permit an award under the Monell standard. Monell, and the Court's instruction based upon it, created an issue of fact of whether the District employees' actions were taken with the approval of the government. Plaintiffs argued and offered evidence that use of agents provocateurs and other plainly illegal conduct were common in the Intelligence Division. Counsel for the District were content to rest their defense principally on an MPD General Order that

^{22/} The Court of Appeals decided Dellums v. Powell prior to Monell, and expressly based the theory of municipal liability it employed on what the Court of Appeals termed "respondeat superior" liability predicated on the liability of various employees. While the use of classic respondeat superior vicarious liability has been precluded by Monell, the broader significance of Dellums for this action remains: if the District should have been liable vicariously for the acts of its employees in Dellums, it follows that, in the wake of Monell, municipal responsibility should attach to actions of its employees that it "approved" and that injured plaintiffs in the exercise of their constitutional rights. There is simply nothing in the special status of the District of Columbia that would require--or permit--a unique rule to govern constitutional torts committed by District employees who are themselves liable on a Bivens rationale. See 184 U.S.App.D.C. at 332-33, 566 F.2d at 224-25.

blandly stated that the Intelligence Division's legitimate duties in the relevant period were to anticipate and deter unlawful disruptions within the District of Columbia. The jury was entitled to find that, despite that MPD directive, illegalities that injured plaintiffs in the exercise of their First-Amendment rights did occur, and were municipal practice, approved in the manner contemplated by the Monell Court. Given the record in this case, the Court cannot disturb the jury's judgment that some of the District employees' conduct was conduct executing the local government's policies and customs.

The jury found that the District government was liable for the participation of its employees in the conspiracies plaintiffs proved to have existed within the MPD and between MPD and FBI personnel. The Court could not, in view of the decision in Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980), have withdrawn the issue of municipal conspiratorial liability from the jury on the theory that the District government is not a "person." Moreover, defendant has, at no stage of this litigation, objected to the instructions as impermissibly permitting a verdict of conspiratorial liability against itself because it is not a "person" within the meaning of 42 U.S.C. § 1985(3). Corporation Counsel's argument regarding the applicability of section 1985(3) to the District government was limited to the question, discussed at pp. 7-8 supra, of whether the District falls within the geographical terms of the statute that makes actionable certain conduct within "any state or territory." Defendant made no attempt to disturb the Court's decision to rely on the holding in Owens v. Haas that a municipal corporation is a "person" for purposes of 42 U.S.C. § 1985(3); indeed, Corporation Counsel did not cite Owens v. Haas on any question related to section 1985(3). To open this issue at this late stage of this protracted case would be contrary to considerations of fair and orderly trial administration. Cf. City



of Newport v. Fact Concerts, Inc., 101 S.Ct. 2748, 2754 n.11
(1981). See generally Monell v. Department of Social Services,
supra (municipal corporation a "person" within meaning of 42
U.S.C. § 1983); but cf. Owen v. City of Independence, supra
(municipal corporation incapable of satisfying prerequisites for
"good faith" immunity).

III. The Statute of Limitations

In September 1981 the FBI defendants sought judgment on the pleadings based upon the statute of limitations. Plaintiffs, the FBI defendants claimed, had failed to commence suit upon their rights of action within three years from the time those rights accrued, and the longest statute of limitations that might apply to the claims in this case was three years. Plaintiffs replied to defendants' motion by seeking benefit of the doctrine of fraudulent or deliberate concealment. Plaintiffs alleged that the FBI and MPD defendants had deliberately concealed their program of disruption in the late 1960's and early 1970's from the public and from plaintiffs, and that consequently plaintiffs could not, through the exercise of due diligence, have learned the material facts necessary to commence the lawsuit within three years of the injuries they suffered. Defendants, however, offered in support of their motion newspaper and magazine articles from the early 1970's that, according to defendants, should have provided plaintiffs with the material facts needed for commencement of suit; defendants also offered statements by various plaintiffs at depositions that they knew someone was either observing their activities or harrassing them, and that they had, as early as 1968, considered suing government officials in response. Plaintiffs opposed the motion for judgment on the pleadings with evidence that the FBI and MPD had attempted to

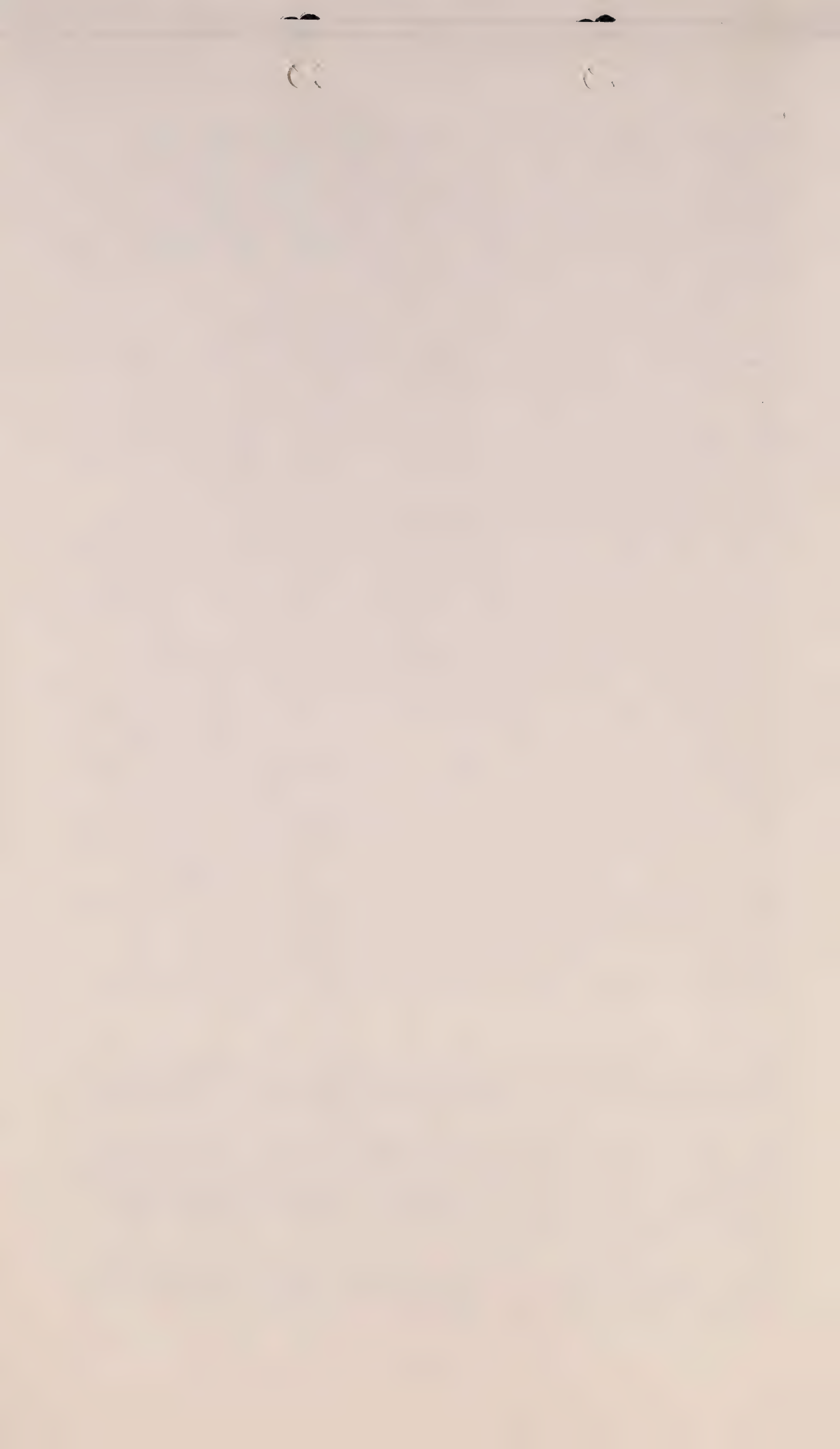
maintain strict secrecy about COINTELPRO and the MPD's anti-protest activities. Not until 1976, they argued, after the hearings of the Church Committee and the inquiries of the D.C. City Council, did they possess the information they needed to sue in vindication of their First-Amendment rights.

The Court denied the motion for judgment on the pleadings.^{23/} See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981). The Court determined that the applicable statute of limitations was the three-year statute in D.C. Code 12-301(8) (1973 ed.), and concluded that issues of fact were presented regarding inter alia the state of plaintiffs' actual knowledge of their rights of action on July 16, 1973, the date three years before they commenced this action.^{24/} As the Court noted, the doctrine of fraudulent or deliberate concealment attaches to every statute of limitations applied in federal-question litigation. See Holmberg v. Armbrrecht, 327 U.S. 392, 397 (1946). Issues of this character are not readily susceptible to summary disposition.^{25/} See, e.g., Richards v. Mileski, 662 F.2d 65, 73 (D.C.Cir. 1981); Smith v. Nixon, 196 U.S.App.D.C. 276, 283, 606 F.2d 1183, 1190 (1979); Fitzgerald v. Seamans, 180 U.S.App.D.C. 75, 83, 553 F.2d 220, 228 (1977); cf. Emmet v. Eastern Dispensary & Casualty Hospital, 130 U.S.App.D.C. 50, 396 F.2d 931 (1967); see also Davidov v. Honeywell Inc., No. 4-77 Civ. 152 (D.Minn., June 12, 1981), slip op. at 6-7. And if the

^{23/} A similar motion had been denied without prejudice to renewal when this case was assigned to Judge Pratt. See Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979).

^{24/} The Court found that such an application of D.C. Code 12-301(8) to be the law of the case. See Memorandum and Order of October 29, 1981 at 2. Judge Pratt's prior Order, while denying the earlier motion without prejudice to renewal, unequivocally decided that the three-year statute was the longest that might apply to plaintiffs' claims.

^{25/} A plaintiff may, for example, have known his telephone was bugged, or that agents were watching him, without knowing of the conspiracy to disrupt First-Amendment activities.



entitlement to equitable relief under the doctrine of fraudulent or deliberate concealment depends on questions of fact, those issues of fact must be resolved in a damages action by the jury. See Music Research, Inc. v. Vanguard Recording Soc'y, 547 F.2d 192 (2d Cir. 1976); cf. Briskin v. Ernst & Ernst, 589 F.2d 1363 (9th Cir. 1978); Jones v. Rogers Memorial Hospital, 143 U.S.App.D.C. 51, 442 F.2d 773 (1971).

A. The Statute of Limitations Instructions

The recent discussion of the order of proof on a claim of fraudulent or deliberate concealment in Richards v. Mileski, supra, together with the seminal decision in Fitzgerald v. Seamans, supra, provided the basis for the instructions to the jury. The Court of Appeals in Fitzgerald v. Seamans established that a plaintiff's knowledge that some defendants were responsible for his injury did not necessarily mean that the plaintiff would have had sufficient knowledge of other defendants' involvement intelligently to have prosecuted his claims against the others. See 180 U.S.App.D.C. at 84, 553 F.2d at 229. In Richards v. Mileski the Court of Appeals determined that a plaintiff's knowledge that the defendants had injured plaintiff through false accusations that he was not suitable for a job was not equivalent, for purposes of the doctrine of fraudulent or deliberate concealment, to knowledge that those same defendants knew the accusations were false, and that the defendants were involved in a conspiracy to use the accusations against the plaintiff and to conceal their falsehood.

Because the present case involved so many parties and so many particularized allegations of injury, the jury's task was formidable: it had to determine, with respect to each claim, whether a particular plaintiff was, as to a particular defendant on that particular claim, barred from suit by the statute of limitations. As the Court explained that task to the jury, it



was necessary first to determine whether the plaintiff had sufficient actual knowledge of his right of action to have intelligently prosecuted it more than three years before the commencement of suit. If he did not, the plaintiff still had the burden of proving that the defendant who had raised the limitations defense deliberately concealed from him those material facts needed for intelligent prosecution. If the plaintiff succeeded in that proof, the defendant then had to prove that plaintiff could nevertheless have discovered the necessary facts within three years of the accrual of the right of action through the exercise of due diligence. See Richards v. Mileski, supra, 662 F.2d at 69-72.

Defendants in their motions for a new trial assert that the instructions on the statute of limitations were defective in two respects. First, defendants insist that the jury should have been told that "mere silence by a defendant is not fraudulent or deliberate concealment." Second, defendants argue that the Court erred in instructing the jury that deliberate concealment to serve "law enforcement considerations" defined by the FBI or MPD might--or might not---be the type of concealment against which the equitable doctrine could provide relief. According to defendants, the Court's instruction on that point contradicted "the principle that concealment by a third party may not be attributed to the defendant" and "the principle that the concealment must have been wrongful."

Turning to the second objection first, the instructions did not violate either of the "principles" that defendants recite. The Court did instruct the jury that the defendant or (with respect to conspiracy claims) the defendant's co-conspirators must be proved to have engaged in concealment of the relevant facts. The Court then defined "deliberate concealment" in these terms:

"By deliberate concealment, I mean that defendant or a conspiracy to which a defendant belonged deliberately kept information away from a plaintiff which was material to that plaintiff's claim. It is immaterial whether the defendant or conspiracy kept the material [sic] from plaintiff because the agency employing the defendant or the conspirators believed that law enforcement considerations required concealment, or whether the material facts were concealed for the purpose of impeding plaintiffs' prosecution of their claims."

Such an instruction seemed essential in avoiding unnecessary complexities of motive in cases of this type. Defendants were alleged to have engaged, over a long period of time, in clandestine disruptive activities; at the time they did so, defendants assumed their efforts would remain covert. The secrecy of their operations obviously would have been violated by civil litigation as surely as it would have been by publicity of any other sort. Defendants, if they did engage in deliberate concealment, could thus have rationalized their conduct either as required for a "law enforcement purpose," or to protect themselves from liability in damages. Indeed, because secrecy was so important to their missions, it could have seemed to defendants that "law enforcement considerations" themselves required concealment "for the purpose of impeding . . . prosecution" of civil complaints. Like the schemes in Smith v. Nixon, supra, and Fitzgerald v. Seamans, supra, concealment of defendants' activities in this case was of the essence; it would be impossible for a trier of fact in this case to have determined that the official wrongdoers concealed their operations, not in furtherance of their disruptive objectives, but exclusively to protect themselves from litigation. If, as defendants appear to argue, no concealment for such a "law enforcement" purpose as that they invoked in this case can ever be "wrongful," then there would have been no basis for the determinations in Smith v. Nixon and Fitzgerald v. Seamans that the plaintiffs in those cases



might have been entitled to equitable relief from the statute of limitations. Accepting as true the general proposition that concealment must be "wrongful," see General Aircraft Corp. v. Air America, 482 F.Supp. 3 (D.D.C. 1979), the "wrongfulness" in this case, like that in the Nixon and Fitzgerald cases, consisted of defendants' effort to conceal COINTELPRO and the MPD activities from the public despite the unlawfulness of the FBI and MPD programs.^{26/}

Defendants' other objection, that the Court erred in not instructing the jury that "mere silence" is not fraudulent or deliberate concealment, is also off the mark. To have instructed the jury in this case that "mere silence" might not be "concealment" for purposes of the limitations defense would have risked confusion. The bare concept of silence is inherently difficult to apply. What matters is not some distinction, always difficult to draw, between action and inaction (or "silence") but the deliberateness of a defendant's conduct in foreclosing discovery of the facts a plaintiff would need to prosecute his claim against that defendant. See Smith v. Nixon, supra, 196 U.S.App.D.C. at 283, 606 F.2d at 1190. In Richards, it was enough that the defendants had published the false reports and then held their peace, knowing the reports to have been false. See 662 F.2d at 69-70. In this case, defendants assumed false identities as protesters, as students, and as parade coordinators, or they conducted their operations in a manner otherwise calculated to conceal their official status. They maintained, as far as they were able, secrecy about their undertakings. Such conduct is functionally indistinguishable from that in Smith v. Nixon, supra. The jury had to be given an

^{26/} Because the instructions required that concealment vel non be attributable to the defendant or (with the conspiracy claims) to the overall design of the conspiracy, they would not have permitted verdict based impermissibly on what defendants call "third party" conduct.

opportunity to decide whether what transpired here was not "mere silence" (as defendants characterize it), but instead was "silence" observed by defendants as a strategy for concealment that prevented a timely claim.

Finally, defendants object to the placement of the limitations issue on the special verdict form as the third principal issue for the jury's decision. According to defendants, since the statutory defense bars a claim, it should have been placed first on the special-verdict form, ahead of the questions that required the jury to determine whether any plaintiff had been injured. The Court placed the limitations issue after the injury issues in order to ensure that the jury could make its findings on the statutory defense in the manner contemplated by Fitzgerald v. Seamans and Richards v. Mileski without undue confusion. The entitlement to equitable relief may, with respect to a particular plaintiff, vary among the plaintiffs' different claims---as in Richards---or among different defendants--as in Fitzgerald. It would thus have been difficult for the jury to determine which claims were barred, and against which defendants, until it had first isolated for itself the specific allegations each of the nine plaintiffs made. It was therefore better practice to confront the jury with the basic questions of injury vel non first, inasmuch as those questions would, once framed and answered, provide the context for the questions posed by the statute of limitations. In any event, assuming the instructions were not erroneous, there is no indication that the verdicts were affected by the order in which the special form presented the questions for the jury's decision.^{27/}

^{27/} It bears noting that defendants, even though they object to the order of questions on the special verdict form, did not object to the Court's preliminary instructions to the jury that stated the limitations defense after the issue of primary injury. Moreover, it bears noting that the Court advised the jury of the important beneficial purposes of the statute of limitations.

B. The proof regarding the limitations defense

Defendants also argue, in their motions for judgment n.o.v., that the proof adduced at trial was insufficient to entitle plaintiffs to relief from the statute of limitations. According to defendants, there was conclusive evidence that plaintiffs knew of the existence of their rights of action prior to July 16, 1973. Defendants also assert that plaintiffs failed to provide adequate evidence of fraudulent or deliberate concealment, and that the evidence showed that the plaintiffs might through the exercise of due diligence have discovered whatever information they needed to commence suit within three years of their injuries. The Court has concluded, however, that the evidence on the relevant issues of fact was not so clearly in defendants' favor as to entitle them to relief under Rule 50. See Vander Zee v. Karabatsos, supra; see also Pan America Petroleum Corp. v. Orr, 319 F.2d 612, 614-15 (5th Cir. 1963).

If a plaintiff has actual knowledge of facts that would have permitted him intelligently to have prosecuted a given claim against a defendant more than three years before he actually filed suit, the claim based on those facts is barred. Fitzgerald v. Seamans, supra; cf. United States v. Kubrick, 444 U.S. 111 (1979). In this case there was highly credible evidence, much of it drawn from depositions of plaintiffs at the earliest stages of the litigation, that plaintiffs strongly suspected official misconduct long before they commenced suit. Certain plaintiffs even admitted that they had discussed among themselves the possibility of suing the government, long before July 16, 1973, and prior to the Church Committee hearings or the D.C. City Council investigations. Certain plaintiffs admitted having read articles published in New York and Washington on "secret" FBI efforts to disrupt protest organizations. The articles specifically mentioned the "Head Tax" scheme, one of the COINTELPRO programs that some plaintiffs alleged injured

them.^{28/} Other plaintiffs admitted to strong suspicions, sometimes confirmed by conclusive information obtained by them prior to July 1973, that some of their anti-war associates were in fact undercover police officers. On the other hand, the evidence did not establish precisely how much the plaintiffs who suspected that they were victims of official interference knew about COINTELPRO or the MPD's activities. Plaintiffs' suspicions were, it appeared, more often vague than specific. They seem to have had more knowledge of official surveillance---itself perhaps not unlawful^{29/}---than of concerted efforts to disrupt their protest activities. And there was ample evidence from which the jury could find that most of the Church Committee's findings provided plaintiffs their first credible account of the conspiracies they alleged.

The jury apparently segregated some claims that it deemed statute-barred from others that it considered not to be barred in a way that lends strong credibility to its overall findings on the statute of limitations issues. See Richards v. Mileski, supra; Fitzgerald v. Seamans, supra. The jury found, for example, that any otherwise valid claims against two of the defendants, the undercover officers Bynum and Markovich, were

^{28/} According to plaintiffs, in 1969 and 1970 FBI agents attempted to exacerbate disagreements among anti-war and civil-rights activists regarding a proposal that anti-war protesters contribute money to help rebuild Washington after the 1968 riots and to support civil-rights causes. At its inception, a proposal originating with protesters of both races in anti-war and civil-rights groups called on all anti-war organizations to contribute various sums, possibly based upon the level of black attendance at anti-war rallies, to civil-rights and "Black Pride" groups for use in the community. Subsequent disputes regarding that so-called "Head Tax" proposal were intense. According to plaintiffs' evidence, FBI agents who learned of the disputes from their informants attempted to inflate the disagreement by planting suggestions that the anti-war groups pay large lump sums to organizations like the Black United Front. Defendants vigorously denied any involvement in such a scheme.

^{29/} See Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co., 192 U.S.App.D.C. 376, 593 F.2d 1030 (1978); Berlin Democratic Club v. Rumsfeld, 410 F.Supp. 144 (D.D.C. 1976).

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barred by the statute of limitations.^{30/} There was considerable support in the evidence for those findings. By virtue of those two defendants' infiltration of the protest organizations, the plaintiffs who might have been injured by those two defendants associated closely with Bynum and Markovich. The jury could reasonably have concluded that those plaintiffs either had actual knowledge of the two undercover officers' roles, or could through the exercise of due diligence have discovered their roles, long before July 16, 1973. Indeed, there was evidence that at least one plaintiff had positive evidence that Markovich was a police officer prior to July 1973. But the jury's finding that the claims against Bynum and Markovich were statute-barred did not require a finding that claims against the other defendants, even for the same injuries, were statute-barred. The jury could have determined, under the rule in Fitzgerald v. Seamans, *supra*, that the plaintiffs' actual knowledge of the undercover officers' activity could not reasonably have been expected to give them an awareness of misconduct elsewhere within the Intelligence Division or within the FBI. Far from being evidence (as the MPD defendants argue) of "inconsistent verdicts," the jury's distinction between claims against the undercover officers and the other MPD Intelligence Division defendants thus suggests a careful judgment that should not be disturbed. Finally, it bears noting, in connection with the verdicts against the other defendants, that the jury may well have found certain claims against them to be statute-barred while it found others not to be barred. See Richards v. Mileski, *supra*. The Court's present task is at an end if it appears from the verdicts and the evidence that the jury could have reasonably found that some

^{30/} With respect to claims by plaintiff Abbott, for example, the jury found that the various claims against Bynum and Markovich were either barred by the statute of limitations, or should not result in an award of damages because the two defendants were, as to those particular claims, entitled to immunity.

claims against a particular defendant were not statute-barred, and that question is easily answered in the affirmative. The jury was entitled to credit the evidence that prior to the spring of 1976 plaintiffs had no awareness, nor could they be expected to have had awareness, of the central connections among the various attacks upon them.

Defendants' challenge to the proof regarding concealment and due diligence is even less powerful than their assertion that plaintiffs had actual knowledge of the material facts more than three years before the commencement of suit. Plaintiffs had the burden of proving concealment of the material facts and they offered considerable evidence in support. There was evidence of the scope and intensity of the FBI's attempts to ensure that COINTELPRO remained secret. There was evidence that the District of Columbia had destroyed a body of Intelligence Division documents in the 1970's and thereby virtually obliterated much of the record of the activities of the Division. The evidence, taken as a whole, thus supported the jury's findings that plaintiffs could not have discovered the material facts needed to prosecute particular claims. Here, too, the jury may have found that, as to particular claims---the "Head Tax" program, for example---a person could through the exercise of due diligence have discovered the facts needed for suit. But even if the evidence required such a finding on the due-diligence issue as to a particular claim, other claims could survive. Assuredly, the evidence did not compel the jury to find that all the claims a plaintiff had against a particular defendant were discoverable through the exercise of due diligence. The jury's ultimate resolution of the due-diligence issues presented to them therefore will stand.

IV. Limited Official Immunity

All of the individual defendants sought benefit of the

limited official immunity for law-enforcement personnel recognized in Pierson v. Ray, 386 U.S. 547 (1967), and later decisions. In their present motion the MPD defendants assert that the evidence compelled a verdict that many of them were immune. The FBI defendants seek relief on the immunity issue only in their motion for a new trial, in which they suggest that the terms the Court used on the special-verdict form to state the immunity question were "inadequate."

The FBI defendants' objection to the special-verdict form's statement of the immunity issue borders on the frivolous. In lengthy instructions that apparently are not now challenged by any defendant, the Court explained to the jury the criteria for qualified official immunity, and indicated how the jury should record the verdict they reached on the immunity claims. Defendants argue, however, that the Court should have included on the special-verdict form a description of "the concept of good faith immunity." Asserting that "[t]he concept of immunity from liability is not one which a jury of laymen could be expected readily to understand," defendants insist that the special-verdict form should have asked: "Did the defendant believe reasonably and in good faith that his actions were proper?" The purpose of the special-verdict form was to provide a mechanism for the jury to record its findings on the question put to it by the Court; the purpose of the instructions, in whose formulation defendants participated, was inter alia to explain the concept of immunity. The criteria for official immunity would, moreover, have required a summary on the special verdict form different from that proposed by defendants. A belief that one's actions were "proper," even if reasonable and characterized by "good faith," obviously will not avail a defendant who does not act within the scope of his authority. See Procunier v. Navarette, 434 U.S. 555, 571 (1978) (Stevens, J., dissenting); Wood v. Strickland, 420 U.S. 308, 322 (1975). Of course, the issue of

whether these defendants acted beyond the scope of their authority---that is, "for reasons unrelated to the performance of their duties," see 434 U.S. at 571---was clearly not as important in this case as the question whether they acted with a reasonable and good-faith belief in the propriety of their actions. But the Court had no basis in this case for withdrawing that issue from the jury in the wording of the special-verdict form. Defendants' proposed formulation might have had that consequence and, in any event, their statement of the immunity issue does not appear to the Court to possess any material advantage for a properly-instructed jury over the formulation the Court employed.

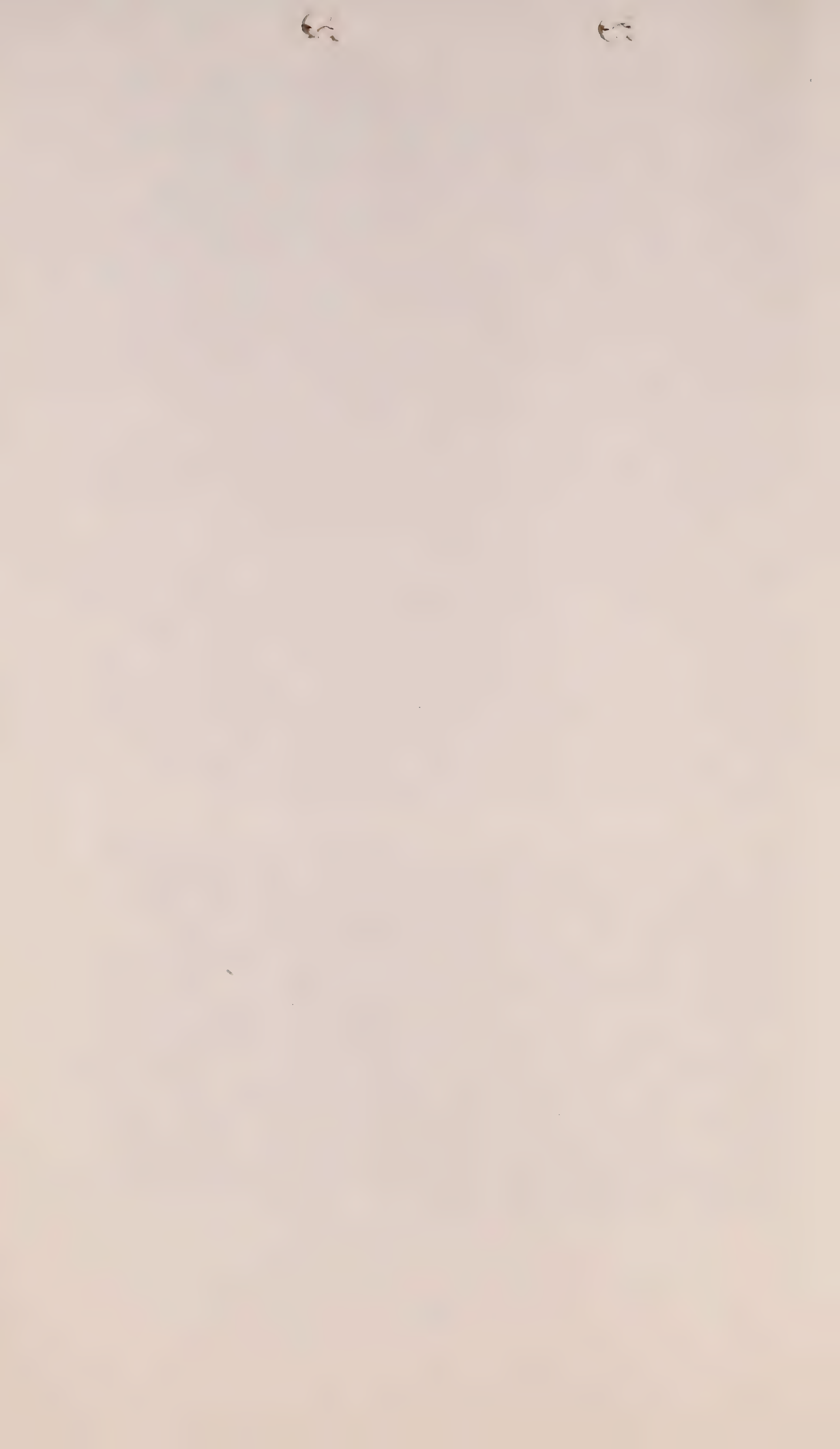
The MPD defendants argue that, because many of their activities were lawful and specifically authorized by the regulations governing the work of the Intelligence Division, and because they did not know about COINTELPRO, the jury was required to grant them immunity for any injuries they inflicted on plaintiffs in the exercise of plaintiffs' First-Amendment rights. See Procunier v. Navarette, supra. There was considerable evidence at trial touching upon the immunity issue. Plaintiffs offered evidence tending to show that MPD officers, some of them defendants or officers acting in concert with defendants, burglarized offices of organizations in which plaintiffs were active, attempted to disrupt peaceful protest meetings, and destroyed machinery used by plaintiffs' organizations to reproduce political leaflets. Plaintiffs also offered evidence of regular contacts between Intelligence Division personnel and FBI officials participating in design and execution of COINTELPRO schemes; such evidence could have provided a basis for a finding that the MPD defendants knew enough about COINTELPRO to know that the information they gave the FBI would be used to disrupt and discredit plaintiffs' political activities. Defendants, however, denied any involvement in any activity not specifically authorized by law or



Intelligence Division practice, and denied any knowledge of any aspect of COINTELPRO. Based upon that evidence, the jury found some defendants to be immune on certain claims of various plaintiffs, and denied immunity on other claims.- The Court cannot say that the evidence that all defendants believed their conduct to be lawful, and that such a belief was reasonable under the circumstances confronting defendants, was so decisive that it would permit the Court to overturn the verdicts. In particular, the strong evidence of burglary committed by MPD officers, and the evidence that various defendants knew of the burglary, contradicted defendants' claims that they believed in good faith and with good reason that their conduct was lawful: no regulation of the MPD relieved the Intelligence Division from the requirement of search warrants.

The jury did, on the other hand, find some MPD defendants to be immune from liability for injuries they inflicted on some plaintiffs. The jury's findings that certain defendants should be immune from liability on certain claims was not, as the other MPD defendants now argue, inconsistent with the jury's other findings that different defendants were not immune.^{31/}

^{31/} The jury found defendants Bynum and Markovich to have been participants in a section 1985(3) conspiracy, and yet also accorded them immunity. Defendants, while arguing that the verdicts were inconsistent because some of them were accorded immunity while others were not accorded immunity, have not suggested that the verdicts were infirm because Bynum and Markovich were found both to have been knowing participants in an actionable conspiracy and also entitled to immunity. The jury assuredly trod a narrow line in returning these verdicts. There is, however, adequate basis in the evidence for the distinction the jury drew and, perhaps for this reason, the defendants have not assigned this point as error. The evidence did not compel a finding that Bynum and Markovich acted from malice. They were at the end of the chain of command. There was evidence and inference from which the jurors could rationally conclude that Bynum and Markovich were entitled to rely for approval of their actions upon the direct orders of their superiors. Bynum and Markovich possibly may have shared the discriminatory animus required for participation in the conspiracy, and joined fully in (footnote continued to next page)



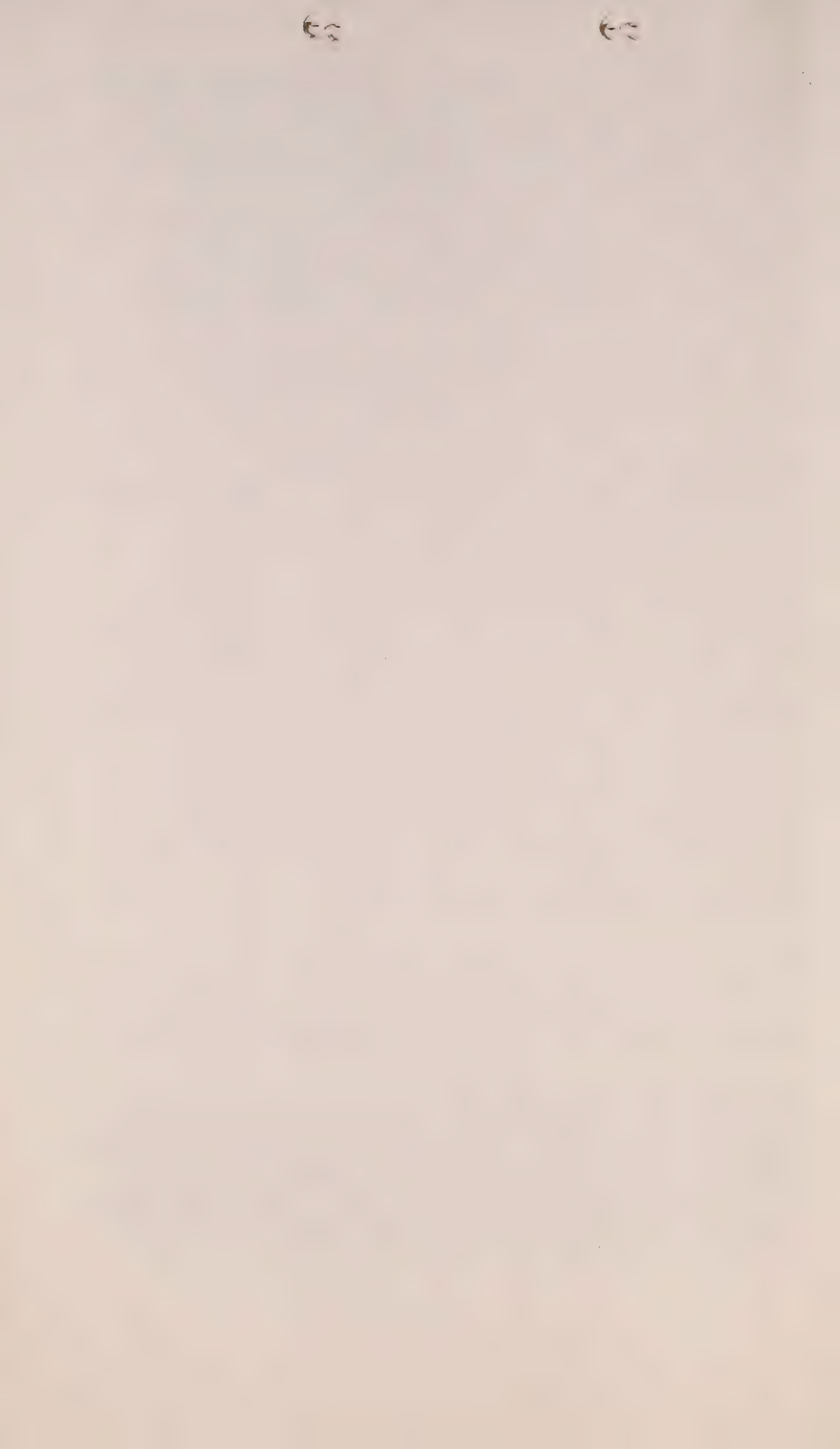
Defendants like Bynum and Markovich, the two defendants whom the jury found most often to be immune from liability in damages, offered detailed justifications for their conduct during their testimony. It was not unreasonable for the jury to see a difference in the belief those officers maintained concerning the lawfulness of their work, and in the reasonableness of that belief, from the belief the other, higher-ranking defendants within MPD may have possessed. Moreover, the jury also found the other MPD defendants, with the exception of defendants Wilson and Herlihy, to be immune from at least some of the claims against them by particular plaintiffs. Wilson and Herlihy were the highest-ranking officers in the MPD group of defendants. Wilson and Herlihy may also have been in the best position to know the law and the facts that might have indicated that the MPD's activities were violating plaintiffs' First-Amendment rights. The Court cannot say that the jury's possible recognition of such a hierarchy of responsibility was insupportable on the evidence adduced at trial. The plausibility of a defendant's claim that he did not know and should not have known about the MPD's involvement in COINTELPRO, or that he reasonably and in good faith believed his own conduct and that of the Department to be lawful, might well depend on the defendant's position with the MPD and within the Intelligence Division.

V. Admissibility of plaintiff's exhibits

Portions of plaintiffs' proof of their claims against the FBI and MPD defendants came from FBI documents obtained either in

(continued from preceeding page)

the conspiracy's objectives, and yet could not be reasonably expected (given the peculiar circumstances of their involvement in the MPD's activities) to have known their conduct was unlawful or improper under the First Amendment. Compare Griffin v. Breckenridge, supra, with Wood v. Strickland, supra, and Bogard v. Cook, 586 F.2d 399, 411 (5th Cir. 1978). Particularly because defendants do not suggest this point as grounds for challenging the verdict, the Court will not disturb the verdicts on this matter.



discovery in this case or through invocation of plaintiffs' rights under the Freedom of Information Act, 5 U.S.C. § 552. In their motion for a new trial defendants object to the admission of certain documents that, in defendants' words, "did not pertain to any defendant, but which could inflame or mislead the jury." See Fed.R.Evid. 401-03. Defendants' specific objections pertain to documents that described FBI attempts to discredit leaders of the Black United Front and to exacerbate difficulties experienced by plaintiffs and other protesters in their efforts to coordinate joint activities of the Black United Front and several anti-war organizations. The Court will, in addressing this ground of defendants' motion, also summarize the other main evidentiary problems in the case, so that defendants' present objections may be seen in context.

During trial, the FBI defendants objected to submission to the jury of excerpts from the Final Report of the Church Committee that described the COINTELPRO operation. The parties reached some agreement about the portions of the Report that might be submitted to the jury. Adopting the view of Rule 803(8)(c) endorsed by this Court in United States v. American Telephone & Telegraph Co., 498 F.Supp. 353, 359-60 (D.D.C. 1980), the Court admitted other segments of the Church Committee's reports proffered by plaintiffs and not covered by stipulation, some of which took the form of factual "evaluative reports" rather than mere compilations of data. See United States v. American Telephone & Telegraph Co., supra; S.Rep. No. 93-1277, 93d Cong., 2d Sess. 18, reprinted in [1974] U.S. Code Cong. & Admin. News 7064. While the admission of "evaluative reports" under Rule 803(8)(c) appears to have been disfavored by the report of the House Judiciary Committee on Rule 803(8)(c), "[e]xtrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position." See 498 F.Supp. at 359. See also Robbins v. Whalen,



653 F.2d 47 (1st Cir.), cert. granted, 50 U.S.L.W. 3453 (Dec. 1, 1981). The Court thus permitted the jury to have the Church Committee's findings regarding the organization of COINTELPRO, the Committee's summary of COINTELPRO's basic target groups (both drawn directly from internal FBI documents), and similar materials. The segments of the Church Committee Report submitted to the jury reflected adherence to appropriate standards of scholarly responsibility, investigative integrity, and trustworthiness. Indeed, the quality of the Report is perhaps evidenced by the fact that similar portions of the same Report have been relied upon by this Court and in other circuits for the background they have provided in other cases concerning COINTELPRO.^{32/} See, e.g., Sims v. CIA, 642 F.2d 562, 564 (D.C.Cir. 19

The Court also admitted, over defendants' objections, portions of the sworn testimony given by various MPD officials in the course of an investigation of Intelligence-Division wrongdoing, conducted in 1975 and 1976 by Assistant Chief Melvin I. Winkelman and by the United States Attorney for the District of Columbia. The FBI defendants particularly objected to admission of Plaintiff's Exhibit 88, which was an excerpt of a sworn statement by former MPD employee Charles Marcum in which Marcum told the investigators of a covert MPD entry at the offices of protest organizations in which certain plaintiffs were

^{32/} To the extent defendants' objection at trial was based, not on the untrustworthiness of the Report or its assertedly "evaluative" quality, but on some prejudicial effect on the defense of the claims against them, it was not well-taken. The Report was clearly relevant to the claims plaintiffs made against the FBI defendants regarding their participation in COINTELPRO. The Court instructed the jury on the requirement that a defendant be proved to be personally liable, either through participation in a conspiracy or through non-conspiratorial activity, and on plaintiffs' burden of proving that liability as to any defendant they charged with responsibility for their injuries. Rule 403 itself creates a presumption against exclusion of relevant evidence. If deemed an objection under Rule 403, then defendants' objection to the Church Committee excerpts the Court found otherwise admissible under Rule 803(8)(c) cannot overcome that presumption. See Miller v. Poretsky, 193 U.S.App.D.C. 395, 408, 595 F.2d 780, 793-94 (1978) (Robinson, J., concurring).

active. According to Marcum's testimony, MPD officers told him they delivered the materials they took from those offices to FBI agents involving in COINTELPRO. In his testimony, Marcum described his own participation in the break-in, and recounted for the investigators reports he had heard from others that a box of documents taken from the offices found their way to the FBI. The Court admitted so much of the excerpt as constituted an admission against interest by Marcum---who was unavailable for testimony in this action---but excluded from the statements it admitted any segment that consisted of double hearsay. See Fed.R.Evid. 804(b)(3), 805.

The FBI defendants also objected at trial to admission of segments of various plaintiffs' FBI files, which were prepared by a number of FBI agents over the course of many years while plaintiffs were under official surveillance. They press that objection in the present motion as well, on the ground that "[n]one of the federal defendants were directly involved in the investigation of any plaintiff," so that the admission of the plaintiffs' files would "permit the jury to consider, and potentially hold defendants liable for, investigative activity which the federal defendants would not have been involved in and would not have known about." The evidence showed that defendants, as agents with roles in implementation of COINTELPRO, were expected to use all information possessed by the Bureau to develop effective programs of disruption and harrassment; indeed, the FBI memoranda that launched COINTELPRO in 1967 and 1968 instructed agents to maintain current files on the targets of COINTELPRO to enhance the effectiveness of the program of disruption. See Plaintiffs' Exhibits 1-3.^{33/} Consideration of plaintiffs' files by the jury could have enhanced the jury's understanding of defendants' efforts to interfere with their

^{33/} Exhibits 1-3 appear in Appendix II.



First-Amendment rights in the manner intended by COINTELPRO. The files were thus admissible, on their face, under Rule 401.

Defendants argue, however, that consideration of the files would also have had an unfairly prejudicial effect. It is true, of course, that plaintiffs did not establish---nor could they have---that the segments of the files proffered for the jury were all segments that one defendant or another used against a plaintiff in the course of COINTELPRO. --But the Court carefully instructed the jury that defendants could be liable only for their own action and for their own knowing participation in a conspiracy, and that intelligence-gathering, including so-called "non-criminal surveillance," was not in itself actionable in this case. See Reporters's Committee v. American Telephone & Telegraph Co., supra; Berlin Democratic Club v. Rumsfeld, supra; cf. Jones v. Unknown Agents of the Federal Election Com'n, 198 U.S.App.D.C. 131, 613 F.2d 864 (1979), cert. denied, 444 U.S. 1074 (1980). A court must not exclude relevant evidence when it appears confusion or prejudice can be avoided by instructions. In the present case, to have committed the error defendants suggest, the jury would have had to ignore the Court's instruction that intelligence-gathering and information retention were not a basis for liability in this case. Given the documents' probative value in demonstrating the character of defendants' interference in plaintiffs' activities, there was no justification for exclusion under Rule 403.^{34/}

Defendants also renew in their motion for a new trial an objection to admission of Plaintiffs' Exhibits 23, 24, 25, 31, and 31A. Exhibits 23, 24, and 25 included a copy of a leaflet, anonymously authored by an FBI agent who was not a defendant, that purported to come from a white anti-war protester angered by

^{34/} The Court admitted only segments of plaintiffs' files, and defendants appear to make no suggestion that the evidence was cumulative.

demands, attributed to the Black United Front, that the anti-war protesters pay blacks to cooperate in various anti-war activities in which some white plaintiffs participated.^{35/} The other pages of these three exhibits were FBI memoranda that discussed possible use of the false leaflet and approved its distribution. In Exhibit 24, which bore the names of defendants Brennan and Moore as either originators or addressees, the Director gave permission to distribute the leaflet, whose objective was, according to the memorandum admitted as exhibit 23, "to widen the rift between the New Mobilization Committee . . . and the Black United Front." Exhibit 25 apparently accompanied a batch of the leaflets given to the WFO, whose agents were instructed to distribute them to appropriate people in Washington in a manner concealing Bureau involvement. All the FBI defendants denied having ever seen the leaflet or the memoranda, or knowing anything about the leaflet. The Court admitted the materials, however, because plaintiffs offered relatively credible evidence that, given the organization of COINTELPRO within the FBI, such documents would have probably required some review by various defendants; the strongest evidence of such a pattern was, of course, the presence of two defendants' names on the critical document approving distribution of the leaflet. The exhibits were highly probative of several plaintiffs' claims of injury against several defendants. Despite its arguably inflammatory language and graphics of Exhibit 23,^{36/}

^{35/} This was the so-called "Head Tax" scheme. See note 29 supra.

^{36/} Without attempting to suggest which passages of Exhibit 23, if any, would have particularly outraged a reader, the Court will note that the document is replete with racist and scatological references. The leaflet calls one leader of the Black United Front "nothing but a black blackmailer," and warns, "Mr. Moore and his pack or herd or pride or whatever you call a group of bloodsucking animals, are in for a shock." The leaflet then proposes, "[I]f they must get something in return for their non-violence towards NMC during these days of demonstrations, give them BANANAS [sic] - all they can eat."



which appears to have been intended to portray its author as a white racist who had contempt for the Black United Front, the leaflet could not be withheld from the jury. Defendants remained free to argue that they should have no responsibility for the leaflet, and it was for the jury to decide the ultimate questions of fact raised by that defense.

Exhibits 31 and 31A included another anonymous leaflet, attributed to a member of the National Steering Committee of the New Mobilization Committee, but in fact prepared by the FBI's New York Field Office. That leaflet excoriated the New Mobilization Committee for its insensitivity to the needs of the Black United Front. Exhibit 31 indicated that the leaflet had a purpose similar to that of the leaflet supposedly authored by the white racist anti-war protester and admitted as Exhibit 23. As with the "racist" leaflet, the New York agents who originated the second leaflet proposed that members of the WFO distribute it to best effect in the Washington area. Like the "racist" leaflet, this leaflet was sent to FBI headquarters for approval by the Director. The evidence of involvement by defendants Moore and Brennan in execution of the proposal from New York office is, however, only circumstantial: their names do not appear on the memorandum that originated in New York transmitting the leaflet, and plaintiffs did not proffer a memorandum that, like exhibit 24, evidenced headquarters approval of the proposal from the New York office. On the other hand, plaintiffs offered credible evidence that Brennan and Moore had routine oversight of proposals like that from the New York office, and there was evidence that materials routed to them in the course of COINTELPRO ordinarily did not mention them by name, but were simply referenced "COINTELPRO" and addressed formally to the "DIRECTOR, FBI." Plaintiffs also argued that defendants assigned



to WFO might have participated in plans to distribute the leaflet prepared in New York, since the New York agents clearly intended that they do so. The proof of liability for any injuries attributable to exhibit 31A was also circumstantial. But plaintiffs' theory of defendants' involvement, at least at the headquarters level, was consistent with the strong evidence of the headquarters defendants' involvement in similar COINTELPRO schemes. And, if the jury believed plaintiffs' assertions that the headquarters defendants had been involved in consideration of exhibit 31A, then exhibits 31 and 31A would have been probative of the scope and character of the conspiracy plaintiffs alleged. Moreover, the content of exhibits 31 and 31A was not so inherently offensive as significantly to risk distortion of the jury's sense of fairness. As its base the only ground for defendants' objection to admission of exhibits 31 and 31A was that proof of their participation in the scheme the exhibits described was circumstantial rather than direct. Article Four of the Evidence Rules does not preclude introduction of circumstantial proof. Cf. Miller v. Poretsky, supra. The probative value of the exhibits outweighing any possible prejudicial impact, the Court admitted them, and cannot now say that their admission is a ground for a new trial.

VI. The motion of defendant Jones

In a motion for judgment n.o.v. stating grounds unique to his defense, defendant Jones renews his argument before trial that he was entitled to involuntary dismissal of the claims against him under Fed.R.Civ.P. 41(b) or, in the alternative, to a continuance of trial on the claims against him. In the present motion Jones contends that plaintiffs so substantially delayed service of the amended complaint naming him as a defendant that he was prejudiced in his defense, and that dismissal under Rule 41 should have occurred before trial even in the absence of

affirmative evidence of prejudice.

Jones was not named as a defendant in the first complaint filed by plaintiffs in July 1976. By 1977, however, once discovery had begun, plaintiffs learned of Jones' role in the "internal security" activities of the WFO, and apparently believed him to have injured them in connection with COINTELPRO effort at the WFO. Accordingly, plaintiffs included Jones as one of the FBI defendants named in the amended complaint filed late in 1977. Plaintiffs thereupon made several attempts---attempts whose good faith is not questioned here---to serve Jones with the papers. First plaintiffs attempted service of Jones at the WFO; later they left the papers at his residence in the Virginia suburbs. In December 1978, Jones, pursuant to 28 C.F.R. § 50.15 (1977), requested appointment of counsel for him by the Department of Justice. The Department, granting the request, assigned the lawyer who was representing all the other FBI defendants in the case to Jones.^{37/}

In 1979, defendant Jones, together with defendant Wilfred R. Schlarman, moved for dismissal of the claims against them. As Judge Pratt, to whom this case was then assigned, summarized their motion, defendants asserted that, as to themselves, "service of process was not effected upon a person of 'suitable age and discretion' at their homes in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure. For both defendants, service was not made upon the defendants personally or upon any other individual." Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979), slip op. at 7. Judge Pratt granted the motion without prejudice to fresh attempts to serve process. See id. at 8; Local Rule 1-14. After the case had been reassigned to the trial judge in September 1980, the Court

^{37/} That lawyer has represented all the FBI defendants since the beginning of the case.

directed the parties to "propose a practical solution for the problem posed by the failure to effect service on a number of defendants," including defendant Jones, who had still not been served. See Order of November 14, 1980. At status calls held in late 1980 and in January 1981, the Court discussed the failure of plaintiffs to serve Jones and other defendants; however, counsel for the "served" FBI defendant declined to take any action, claiming not to represent those unserved defendants and because those defendants "are not under the personal jurisdiction of the Court." See Letter of David H. White (dated November 25, 1980), filed as Attachment to Order of December 8, 1980.

On June 21, 1981, plaintiffs perfected service of process upon defendant Jones after having successfully subpoenaed him for a deposition in this case earlier in 1981. Under Pretrial Orders then in effect, discovery in the case was to terminate at the end of July, 1981, but defendant Jones did not seek an extension of the discovery period.^{38/} Instead, on August 30, 1981, defendant Jones moved for dismissal of the claims against him inter alia for failure to prosecute. Jones argued he would be unfairly disadvantaged by trial in the fall of 1981, and that plaintiffs' failure to serve him in a more timely fashion was willful and inexcusable. On October 29, 1981, the Court denied Jones' motion to dismiss. Addressing the claim under Rule 41, the Court wrote in the Memorandum of October 29:

Jones' suggestion that the claims against him should be dismissed for failure to serve process in a timely fashion must . . . be rejected, inasmuch as he will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented

^{38/} Plaintiffs, in connection with discovery problems unrelated to Jones and his defense, sought and obtained from the Court several extensions of the discovery termination date.

by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct. Counsel for Jones is invited to submit with his pretrial brief an appropriate order concerning claims to be precluded.

Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981), slip op. at 5.

Jones' FBI counsel never submitted the proposed order sought by the Court. Instead, on November 17, 1981, Jones moved for reconsideration of the decision of October 29, 1981, and FBI counsel sought to withdraw from representation of Jones. The latter motion was expressly premised on a belief, supposedly based upon the language from the October 29 Memorandum quoted above, that the only reason the Court denied the Rule 41 motion was the fact that Jones shared FBI counsel with other previously-served defendants. At a status call on November 20, 1981, another member of the District of Columbia bar made a limited appearance on Jones' behalf, in the event the Court granted FBI counsel's motion, and indicated, in papers filed on the eve of trial, an intention (if he entered the case as counsel for Jones) to file a third-party complaint against the United States and to seek continuance of the trial date set in the Court's Order of August 14, 1981. The Court denied Jones' FBI counsel's motion to withdraw, informed counsel who made the limited appearance that he had leave to enter a general appearance and to appear on Jones' behalf at trial, and rejected the motion for reconsideration of the October 29 Order. Jones' FBI counsel still did not file the proposed order sought in the October 29 Order, and counsel who had made the limited appearance on Jones' behalf appeared not to take an active role in court on Jones' behalf.

In the present motion, Jones, through his FBI counsel, renews his argument that dismissal under Rule 41 was required, and asserts that denial of his motion prejudiced his defense. In

the relatively unusual circumstances of this case, it may well be that plaintiffs' counsel have displayed unusual indifference to the requirements of service of process. But the Court has a larger responsibility to ensure fair and orderly trial. A defendant, positioned as defendant Jones was within the group of FBI defendants and possessing actual knowledge of the claims against him, should not exploit the technical defects of a plaintiff's service of process to force upon the Court the difficult question of whether to bar suit against him, or whether to grant a continuance whose practical impact would be tantamount to the barring of suit. Jones' argument now appears to be that nothing short of complete dismissal---or an extensive continuance---would have sufficed, because, from the time he was dismissed from the action in late 1979 until service was perfected in the spring of 1981, he was entitled to assume plaintiffs had lost interest in prosecution of their claims against him. But the extent of the delay in service in this case requires the Court to determine, with some precision, whether Jones was in fact prejudiced by the late service of papers. See Messenger v. United States, 231 F.2d 328 (2d Cir. 1956). In a case such as this, involving common counsel and a movant who was well-placed to know of the progress of the litigation and perhaps to be involved in the defense, the Court should "assess the prejudice vel non suffered by [the movant] rather than . . . the degree of the plaintiff's 'neglect' as to that defendant." Bersch v. Drexel Firestone, Inc., 389 F.Supp. 446, 464 (S.D.N.Y. 1974), rev'd in part on other grounds, 519 F.2d 974 (2d Cir. 1975); see also Preston v. Mendlinger, 83 F.R.D. 198, 199-201 (S.D.N.Y. 1979). And, since defendant's argument is based ultimately on a claim of unfair surprise, the Court ought to examine carefully the steps Jones took once he was served with the papers in June 1981. His claim that he lost the opportunity to engage in discovery is difficult to maintain, since he did not

either seek discovery beyond that already pursued by his fellow FBI defendants or request an extension of the discovery period to plan and then obtain additional discovery. And his claim that it was in a larger sense "unfair" to have put him to his proof on claims plaintiffs had taken years to develop ignores his own failure to pursue the Court's proposal in October 1981 that various claims against him be precluded. It also seems improbable that Jones could not have anticipated, prior to the eve of trial, the need to seek a continuance of trial on the claims against him.

The Court cannot find in the circumstances of Jones' defense as it developed at trial the kind of prejudice that could have justified the extreme remedy that Rule 41 sometimes permits. The policies of fairness embodied in Rule 41 must be enforced. See Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Anderson v. Air West, 542 F.2d 522 (9th Cir. 1976). But federal civil procedure favors disposition of claims on their merits. Keegel v. Key West Trading Co., 200 U.S.App.D.C. 319, 320-21, 627 F.2d 372, 373-74 (1979). It was not apparent from the trial that defendant Jones was in any way prejudiced in his defense: like the other four FBI defendants, Jones was ably represented by the counsel appointed for him in December 1978 by the Department of Justice. While the nature and degree of each FBI defendant's responsibility for the injuries plaintiffs alleged surely differed, Jones, as a litigant, appears to have fared no better, and no worse, than the other FBI defendants. There was no adequate basis shown for dismissal of the claims in October 1981; there was no basis for a continuance of trial shown in November 1981. And there is no basis now for grant of judgment n.o.v. to defendant Jones.

VII. Plaintiffs' Contact with Dismissed Jurors

During the lengthy trial of this action the Court had occasion to discharge several members of the panel selected for

service on the jury and to seat alternates in their places. It appears that, following the close of the evidence on December 14, 1981, but prior to delivery of closing arguments to the jury, one of counsel for plaintiffs contacted a person who had sat on the jury in the early days of trial but who had been discharged on December 3, 1981. Plaintiffs' counsel apparently discussed with the dismissed juror her view of the case and the evidence on the telephone on the afternoon of December 14.^{39/} On December 18, 1981, the Court examined the dismissed juror in proceedings on the record in Chambers and invited questions from counsel. The next day the lawyer for plaintiffs who had contacted the jurors made a statement on the record, and the Court again invited questions from counsel. FBI defendants thereupon moved for a mistrial, and the MPD defendants later joined in the motion. The motion was denied. In their present motions all defendants seek a new trial based upon plaintiffs' contact through their counsel with the discharged jurors.

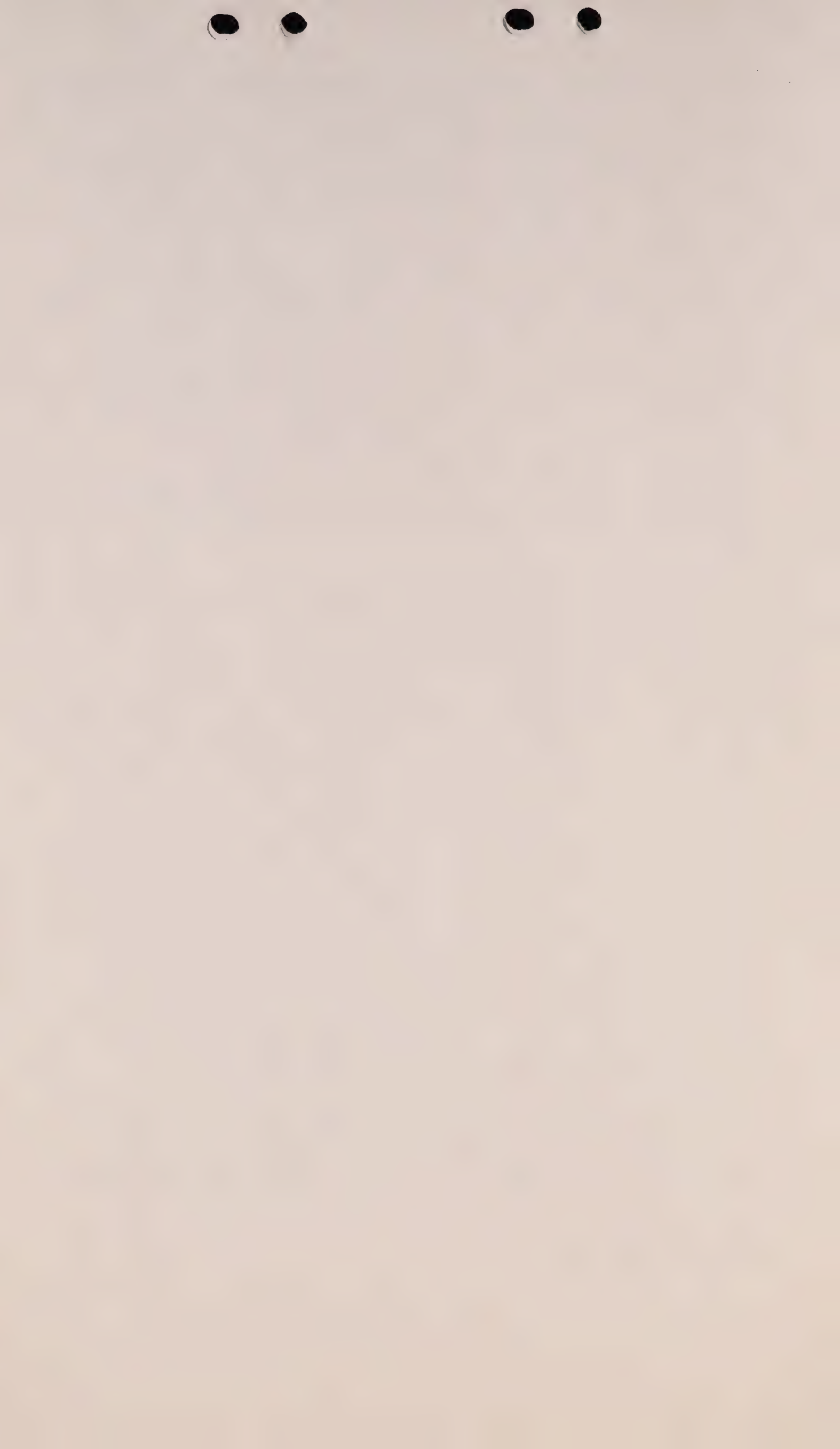
It appears from the statements of plaintiffs' counsel and the discharged juror whom they succeeded in contacting and questioning that that discharged juror freely offered her opinions regarding the evidence she had heard and also described the opinions she perceived the other members of the panel to hold. The discharged juror, in having the conversation with plaintiffs' counsel, must have misunderstood or forgotten the Court's instructions to her at the time of her discharge, that she not discuss the case with anyone "on the outside." Plaintiffs' counsel may have also misunderstood or forgotten the Court's instructions to the discharged juror. The matter is now the subject of an inquiry by the Disciplinary Committee of this

^{39/} Plaintiffs' counsel did not inform the Court or opposing counsel of her intention to contact the dismissed juror. It was only when another dismissed juror informed staff of the Court in the Jury Lounge that plaintiffs' counsel had unsuccessfully tried to reach him on the telephone that the matter came to light.

Court, initiated by the Assistant Attorney-General for the Civil Division. The question here must be whether plaintiffs' counsel's disregard of the Court's instruction to the dismissed juror, and of the general standards that should control any contact by counsel with jurors in any case,^{40/} constitutes grounds for a new trial. The rule that should govern remains that established in Mattox v. United States, 146 U.S. 140, 147-50 (1892), which sets up a presumption that any contact of this character should invalidate a verdict unless its harmlessness can be shown. "A trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." Ryan v. United States, 191 F.2d 779, 781 (D.C.Cir. 1951), cert denied, 342 U.S. 928 (1952).

Leaving to the appropriate forum the question of whether disciplinary action is indicated in this case, the Court has determined that a new trial should not be granted on this ground. The parties had rested at the time of the contact with the dismissed juror. There was no longer an opportunity for plaintiffs to have conformed their proof to the advice of the dismissed juror. The only direct effect her advice could have had would have been on design of closing statements, and perhaps in final argument to the Court regarding the Court's instructions to the jury. The information plaintiffs gained had no impact at all on the Court's instructions, and apparently no effect on plaintiffs' requests in connection with the instructions. The only discernible effect the conversation with the discharged juror appears to have had on plaintiffs' closing was on plaintiffs' discussion of the statute-of-limitations issues in their closing. Perhaps because the dismissed juror had told plaintiffs' counsel that she believed the limitations defense to

^{40/} See Local Rule 1-28.



be difficult to understand, plaintiffs' counsel took pains to emphasize the basic simplicities of the defense. That is, however, the only possible effect on the trial that the Court's inquiries have disclosed, and even it is highly speculative. And there is no suggestion that counsel's argument on the limitations was in itself inappropriate in any concrete way. Defendants' counsel had ample opportunity to answer plaintiffs' argument on the limitations issue, and they did so. Even if it is assumed that plaintiffs' counsel formulated their closing argument, perhaps particularly that touching the limitations defense, with the discharged juror's comments in mind, the Court finds there was no prejudicial impact on the jury's verdicts stemming from the incident.

VIII. Damages

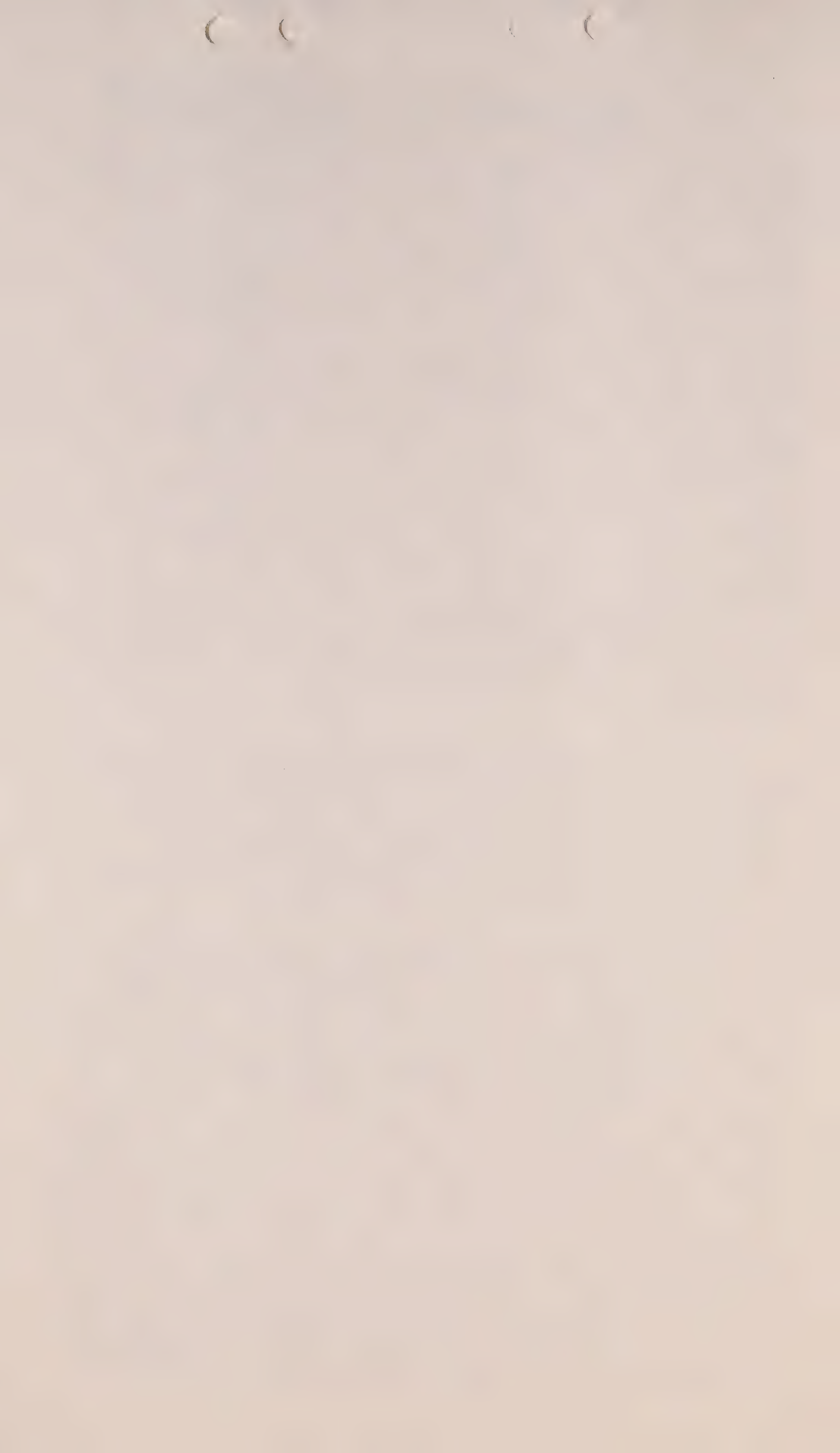
The jury, having found particular defendants liable to the plaintiffs, awarded sums of compensatory and punitive damages amounting to \$93,750 to each of five plaintiffs and \$81,062.50 to each of the other three prevailing plaintiffs; individual defendants' liability ranged from \$75,000 to \$9,375. The jury's award may be summarized on the following table, which identifies the three prevailing plaintiffs who received the lesser sum as "Group 1 Plaintiffs" and the five who received the greater sum as "Group 2 Plaintiffs."

	Each Group 1 Plaintiff (Booker, Eaton, Hobson)	Each Group 2 Plaintiff (Abbott, Bloom, WPC, Pollock, Waskow)
Brennan*	\$9375	\$9375
Moore*	\$7500	\$7500
Jones*	\$5625	\$5625
Grimaldi*	\$4687.50	\$4687.50
Pangburn*	\$5625	\$5625
Wilson*	\$5625	\$5625
Herlihy*	\$4687.50	\$4687.50
Acree	----	\$2562.50
Scrapper	----	\$3125
Jagen	----	\$2562.50
Suter	----	\$2562.50
Mahaney	----	\$1875
District of Columbia	\$37973.50	\$37937.50

*Award includes punitive damages (one-third of total award). See page 5 supra.

The sharp graduation in the amounts the jury fixed reflects the jury's judgment, based upon the Court's instructions and the evidence, regarding the extent of the injury suffered by plaintiffs and the measure of each defendant's responsibilities for those injuries.

In the present motions defendants make numerous objections to the jury's awards. Defendants argue that the awards were excessive and against the weight of the evidence; that the awards reflect an impermissible mathematical proportionality that reveals their arbitrariness; that punitive damages should not have been awarded at all; and that the award against the District of Columbia was wholly out of proportion to any other awards and thus was particularly arbitrary. In addition, the FBI defendants assert that the Court erred in not instructing the jury that the United States itself would not pay an award against the federal defendants. The District of Columbia defendants also argue that the Court's instructions and the special-verdict form permitted



the jury to grant an impermissible "multiple" award against several defendants for a single injury, and therefore allowed double, or more than double, recoveries.

The Court's instructions on compensatory damages were based principally on the two critical decisions of the Court of Appeals on First-Amendment damages: Tatum v. Morton, 183 U.S.App.D.C. 331, 562 F.2d 1297 (1977), and Dellums v. Powell, 184 U.S.App.D.C. 275, 566 F.2d 167 (1977), cert. denied, 438 U.S. 916 (1978). As the Court advised the jury, compensatory damages embrace proven out-of-pocket damages and a fair and reasonable amount for any proven physical pain, mental suffering, and for the intangible, though nonetheless real, loss of First-Amendment rights of speech, assembly, protest, and association. Dellums v. Powell, supra, 184 U.S.App.D.C. at 302-04, 566 F.2d at 194-196; Tatum v. Morton, supra, 183 U.S.App.D.C. at 334-37, 562 F.2d at 1281-85; id. at 1285-87 (Wilkey, J., concurring). The Court took pains to inform the jury that the burden of proof of such actual injury as could be a basis for compensatory damages rested upon each plaintiff. Cf. Carey v. Piphus, 435 U.S. 247, 262-65 (1978); see also Halperin v. Kissinger, 196 U.S.App.D.C. 285, 300 n.100, 606 F.2d 1192, 1207 n.100 (1979), aff'd by an evenly divided Court, 101 S.Ct. 3132 (1981). The Court also instructed the jury that, "insofar as it seeks to compensate intangible losses of First-Amendment rights, your award must be proportioned to the loss actually suffered by a plaintiff" whose exercise of First-Amendment rights the defendant was found to have impeded. See Dellums v. Powell, supra.

Turning first to the objections to the instructions and to the verdict form, there is no merit in the federal defendants' claim that they were entitled to an instruction that the United States would not pay a judgment against them. There was no trace of evidence, in plaintiff's case or in defendants' case, regarding possible disposition of judgments against these active

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and retired employees of the United States, and therefore no basis for any instruction on that matter. Defendants were entitled to offer proof of the hardship an award might cause, and to argue hardship to the jury; to a limited extent, they attempted both, and the jury's awards may reflect a judgment regarding those hardships to the extent of the evidence on the issue. Nor is there merit in the District of Columbia defendants' suggestion that the instructions and verdict form permitted "multiple" recoveries. In cases of this type, there may be some danger of a duplicative award. See Dellums v. Powell, supra, 184 U.S.App.D.C. at 317-18, 566 F.2d at 209-10 (Leventhal, J., concurring). The Court therefore instructed the jury to divide the sum it fixed to compensate an injury among all those it found responsible for it, and the special verdict form, with its separate spaces for each defendant, would have dissolved any belief on the jury's part that the damages should not be so apportioned.

The defendants' objection to "rigid arithmetical calculation" in the jury's award of damages possesses, in the abstract, no weight at all. The jury was entitled to apportion damages in accordance with the instructions. Defendants cannot now presume to impeach the awards against them because they reflect particular ratios, or seem to defendants to have been derived in a particular manner. The only question is whether those verdicts were excessive, or obviously irrational in some other way that would entitle defendants to relief from them.^{41/} The Court turns to that question now, discussing first the jury's award of compensatory damages and then its award of punitive damages.

^{41/} Defendants point variously to the asserted "disproportionality" of the award against the District government and the equality of the awards against two federal defendants as indications of irrationality. See pp.60-61 infra.

A. Compensatory Damages

Plaintiffs offered extensive evidence of efforts by defendants within the FBI and the MPD to impede the exercise of First-Amendment rights. The evidence included evidence from which the jury could have reasonably concluded that plaintiffs were in fact impeded in the exercise of those rights. The jury was required by the instructions, however, to limit its award of compensatory damages to the injuries actually suffered by plaintiffs in the exercise of their rights; an attempt by defendants to injure the plaintiffs in the exercise of their rights that did not succeed could not have been the basis for an award of compensatory damages, and the award based upon a successful attempt to impede First-Amendment activities had to be measured by the degree of defendants' success. Apart from the intrinsic difficulties of placing some monetary value on rights that are so often said to be "priceless," the jury thus had a difficult task in assessing the intangible injuries the plaintiffs suffered: it had to decide how far defendants' plans to disrupt and discredit plaintiffs' activities actually succeeded. A Court must be reluctant to disturb a jury's work of this kind. Valuation of political and dignitary rights is peculiarly within the competence of a jury. Damage actions by political figures for official abuse of power were well-known at the time when our Constitution and the First Amendment were written, and they were tried to juries. See, e.g., Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763). But the duty of the trial judge to test a verdict for excessiveness and grant relief from one that oversteps the limits of reasonableness is equally plain. See Collins v. Brown, 268 F.Supp. 198, 201 (D.D.C. 1967) (Holtzoff, J.). Discharge of this responsibility has always been "regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right." Virginian Ry. Co. v.

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Armentrout, 166 F.2d 400, 408 (4th Cir. 1948). The Court's function of review is particularly important in public actions like the present one. See Dellums v. Powell, supra, 184 U.S.App.D.C. at 319, 566 F.2d at 211 (Leventhal, J., concurring).

There was evidence in this case which supported findings that the defendants' conduct injured plaintiffs by denying them full association with other persons for pursuit of their social and political causes. The full extent of defendants' disruption of the associational privilege recognized by the First Amendment is especially difficult to assess, and so here, as in Tatum v. Morton and Dellums v. Powell, the compensatory award should "reasonably spacious." See Tatum v. Morton, supra, 183 U.S.App.D.C. at 334, 562 F.2d at 1282. The evidence did not and could not establish with certainty, for example, how many people were discouraged from participation in the semi-annual protests against the Viet Nam War in Washington when defendants diverted protesters to non-existent overnight lodgings, cancelled intercity bus transportation, and interfered with student marshalls' parade communications. Internal memoranda by FBI agents, however, boast of solid successes in deterring anti-war activities. There was, for example, evidence to prove that the attempt to exploit differences between the predominantly white elements (including plaintiffs) of the anti-war movement and black persons in the civil rights movement (including other plaintiffs) delayed collaboration between them and stirred racial distrust for a substantial period of time. There was solid evidence that the unrest thus generated by defendants wasted valuable time and energy and generated considerable anguish, and that plaintiffs were thereby diverted from pursuit of their protest activities.

But to define injury is not to measure it. The jury's quantification of the losses plaintiffs proved to them must be reviewed by the Court. The leading cases provide important

guidance. In Dellums, the jury returned verdicts of \$7,500 for each member of a class of persons unlawfully removed from the steps of the U.S. Capitol and detained by police during a public rally. The Court of Appeals held that the instructions had failed to provide sufficient guidance to the jury in measuring compensatory damages and reversed the judgments. The Court also concluded that the jury's award was "totally out of proportion to any harm that has been suffered." See 184 U.S.App.D.C. at 304, 566 F.2d at 196.— The Court of Appeals noted that the parties might seek, on remand, a determination by the trial judge of appropriate damages on the record at the first trial. 184 U.S.App.D.C. at 304 n.87, 566 F.2d at 196 n.87. On remand the trial judge, on the motion of the parties, fixed damages at \$750 for each class member based upon a supplemental trial record.^{41A/} In Tatum v. Morton, on the other hand, the trial court awarded plaintiffs, who had been unlawfully removed from an area near the White House, arrested, and subjected to unjustifiable rough treatment by police officers, only \$100 each. The Court of Appeals reversed the judgments because it considered \$100 inadequate to compensate each plaintiff for the loss of First-Amendment rights. On remand, the trier of fact awarded sums of roughly \$1,000 for each unlawful arrest, \$400 for each "strip search" of a plaintiff, and various other sums for injuries that resulted from the unlawful action of the police. There was no further appeal.

The present case is different from Dellums v. Powell or Tatum v. Morton in important ways: the injuries suffered here are for the most part quite unlike the traditional, hands-on common-law torts like assault and false imprisonment that helped guide the courts in Dellums and Tatum v. Morton. Here no blows were struck. There was no physical restraint.— None of these plaintiffs were so completely deterred from the exercise of their First Amendment rights by defendants interference or harrassment

^{41A/} See Dellums v. Powell, Civil Action No. 2271-71 (D.D.C., Dec. 13, 1979).



that the jury could have awarded sums that represented the total loss of the right to protest against the government; total loss of that right would, of course, have been "priceless," in any sense of the word. On the other hand, the jury was not required by the evidence to treat lightly the injuries suffered by plaintiffs simply because they were much smaller than they might have been. Cf. Tatum v. Morton, supra, 182 U.S.App.D.C. at 335, 562 F.2d at 1283. The defendants' actions were sustained over a much longer period of time than was involved in the confrontation-like situations considered in the earlier cases. Not one, but many efforts at association and expression were affected. The jury could have observed, and reacted, to the evidence of the cumulative effect on each individual plaintiff of repeated, persistent, though subtle, harassment to impede political association and expression. The relatively limited nature of defendants' success in impeding plaintiffs' activities may have been considered by the jury to be more an indication of the special determination and discipline of the plaintiffs than of the skill, or absence of skill, of defendants in executing their plans.^{42/} Nevertheless, these awards would amount to far more than a year's compensation for the average person employed in the Washington area. Even making an allowance for the intangibility of the injuries the jury attempted to compensate and the high value our society places on freedom of expression, the awards border on the extravagant. Cf. Tatum v. Morton, supra. Each plaintiff may recover compensatory damages only for his or her own actual injuries. Carey v. Phipps, supra; cf. Dellums v. Powell, supra, 184 U.S.App.D.C. at 317-318, 566 F.2d at 209-10 (Leventhal, J., concurring).

^{42/} The Court is convinced that, in fixing the awards it did, the jury was not influenced by the kind of passion or prejudice that would require automatic invalidation of the verdicts. Cf. Butts v. Curtis Publishing Co., 351 F.2d 702, 717 (5th Cir. 1965), aff'd, 388 U.S. 130 (1967).



In appraising these verdicts under the restraints imposed upon a trial judge the Court has also considered, to paraphrase Dellums, whether the liability of each individual defendant may be "totally out of proportion to any harm" that the individual defendant caused. Cf. Dellums v. Powell, supra, 184 U.S.App.D.C. at 304, 566 F.2d at 196. If the standards extrapolated from the District Court and Court of Appeals decisions in Dellums and Tatum were applied to the liability of the individual defendants here, the large verdict against each defendant might well be disproportionate to the harm caused by that defendant. These liabilities range up to about \$75,000 in the case of defendant Brennan. The financial burden imposed by these verdicts upon government officials, and particularly retired ones, is heavy indeed. From their perspective it is difficult to say that the payments they are called on to make are commensurate with the harm the jury found that they caused personally. The actions which caused the injuries found by the jury occurred long ago and may be thought by some to be cured in substantial measure by time and by the very fact that the jury has heard the case and decided it for the plaintiffs against the defendants.

Furthermore, plaintiffs suffered no financial loss against which defendants' financial burden can be compared. If in this case there were no restraints on the Court's prerogative and it could substitute its judgment for that of the jury, the Court would hold that the compensatory damage liability visited upon each defendant should be from ten (10) to twenty (20) percent of what the jury awarded. However, each defendant had some supervisory role, so that each shared responsibility for actions of other actors. More important, they were conspirators and shared responsibility for actions of a large number of co-conspirators. There is an inevitable inequity resulting from the fact that not all of the conspirators (possibly not even the principal conspirators) share proportionately in the financial



burden of compensating these plaintiffs for injuries caused in part by co-conspirators. The law is such that a principal is responsible for his subordinate's actions in the circumstances here, and a co-conspirator is responsible for the actions of the conspiracy. This principle had to be applied in this case to make these defendants liable for injuries that other persons may have joined in causing without personal financial loss to themselves. See generally 1 F. Harper & F. James, The Law of Torts § 10.1 (1956); W. Prosser, Handbook of the Law of Torts 297 (4th ed. 1971); see also id. at 313-23.^{43/}

In view of the foregoing the Court has considered very carefully whether these considerations require, or permit a new trial or proposal of a remittitur of a substantial percentage of the compensatory damages. The jury was given instructions that followed, as closely as possible, the guidelines established by the Court of Appeals for compensation of First-Amendment injuries. Only by finding that the jury simply valued too high these plaintiffs' First-Amendment rights could the Court disturb the verdicts. Such a finding can be made only if it appears from all the evidence at trial that "the verdict is so unreasonably high as to result in a miscarriage of justice," or . . . "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which a jury may operate." Taylor v. Washington Terminal Co., 133 U.S.App.D.C. 110, 113-14, 409 F.2d 145, 148-49 (1969) (quoting Frank v. Atlantic Greyhound Corp., 172 F.Supp. 190, 191 (D.D.C. 1969) and Graling v. Reilly, 214 F.Supp. 234, 235 (D.D.C. 1963)). Though the question is a close one, in light of the burden on defendants, the Court cannot say that the compensatory awards to the eight prevailing plaintiffs can, under the Taylor standard, be set aside for excessiveness. Similarly the Court cannot say that the distinction in the verdicts between the five plaintiffs recovering one sum and the three recovering another sum impeaches the jury's work. Nor can

^{43/} Nothing decided here precludes any claim over for contribution against other co-conspirators or aiders or abettors or their estates.



the Court accept the District of Columbia's argument that the damages against itself were so extraordinary as to be excessive, even if the other awards were not.^{44/} So the Court concludes, with considerable reluctance, that whatever it might have ruled as a trier of fact, it is bound to leave undisturbed the jurors' decision on the measure of compensatory damages awarded in this constitutional tort and conspiracy case.^{45/}

B. Punitive Damages

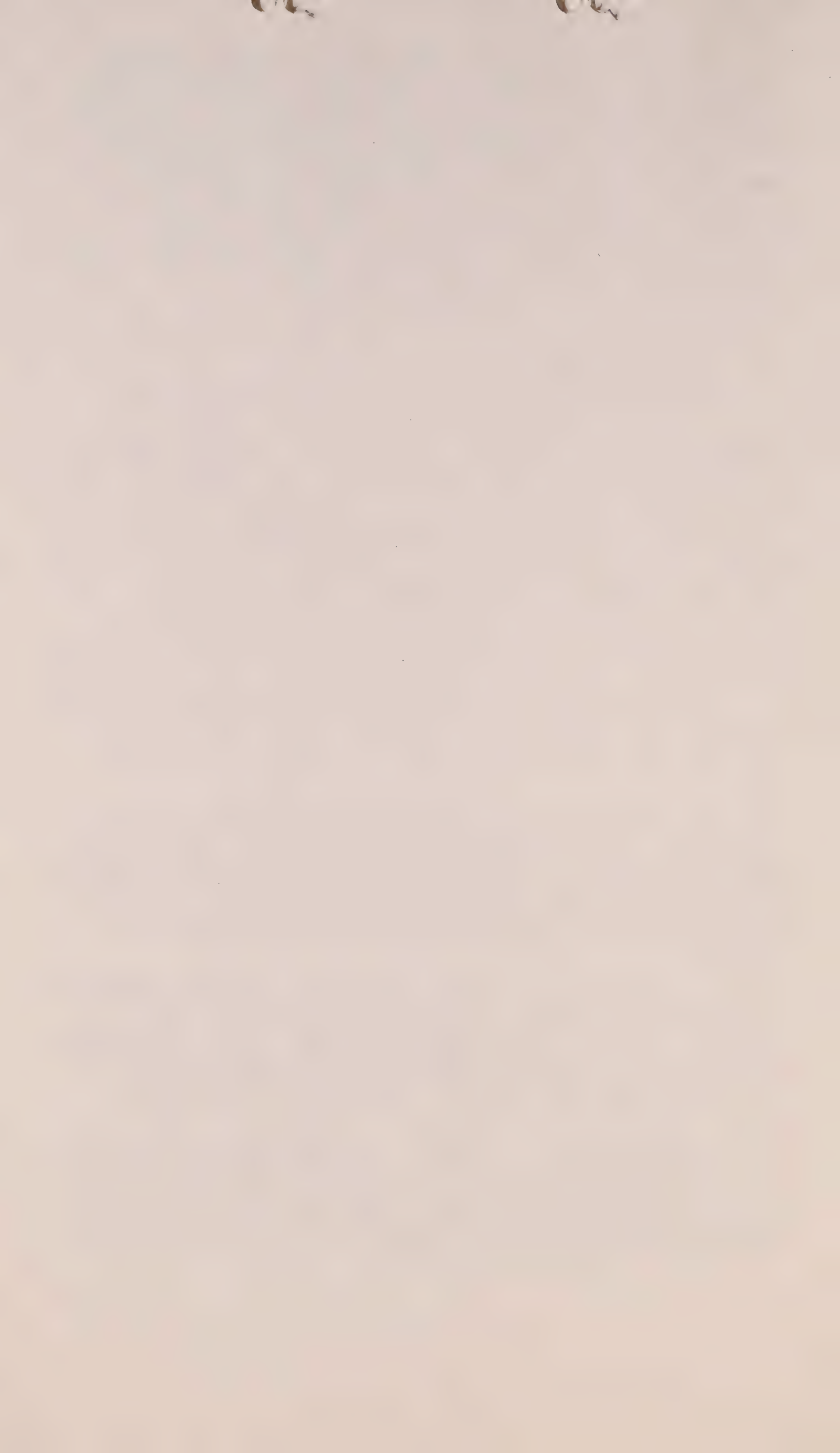
Punitive damages, assessed over and above the amount needed to compensate the injured party, are intended to punish the wrongdoer and to deter him and others from similar misconduct in the future. See City of Newport v. Fact Concerts, Inc., supra, 101 S.Ct. at 2759 (1981). In this case the jury awarded substantial sums in punitive damages against the five FBI defendants, former Chief Wilson, and former Inspector Herlihy. Each of those defendants now challenges the punitive awards.^{46/}

The standard for award of punitive damages is simple: "[t]he tort must be 'aggravated by evil motive, actual malice, delib-

^{44/} The District may well have been held liable for injuries inflicted on plaintiffs by persons other than the individual MPD defendants named in this action. Such a result would not have been implausible under the Monell rule, or unreasonable given the evidence in this case. The Court has considered, and rejected, the possibility that the jury erroneously awarded punitive damages against the District under the guise of compensatory damages.

^{45/} There is simply no basis for assuming, as the FBI defendants have, that the verdicts are erroneous because they resulted in awards of the same amounts against defendants Jones and Pangburn. Whether the two were responsible for the same quantum of plaintiffs' injuries is a question proper for the trier of fact, and the jury's result was scarcely so self-evidently irrational as to permit the Court to set the verdicts aside.

^{46/} The parties did not brief the City of Newport case, and it was not until after the case had been submitted to the jury that the Court discovered the case. Consequently the Court erred in giving instructions that would have permitted a punitive award against the District of Columbia. See 101 S.Ct. at 2762. The error was harmless, however, because the jury made no punitive award against the District government.



erate violence or oppression.'" Nader v. Allegheny Airlines, 167 U.S.App.D.C. 350, 372, 512 F.2d 527, 549 (1975), rev'd on other grounds, 426 U.S. 290 (1976) (quoting Black v. Sheraton Corp. of America, 47 F.R.D. 263, 271 (D.D.C. 1969)). The evidence supported a finding by the jury that the FBI defendants---each of whom asserted a "good faith" immunity defense which the jury rejected---deliberately sought to oppress plaintiffs in the exercise of their First-Amendment rights. There was evidence that the FBI defendants acted with zeal, initiative, and resourcefulness in a campaign of deliberate disruption of lawful protest over a long period. They attempted and effected unlawful restraints on political association for the purpose of political expression. Their conduct violated clear commands of the Constitution as it has been repeatedly and authoritatively interpreted and enforced by the Supreme Court.^{45A/}"It is fundamental that the trier of fact may find malice by drawing inferences from the defendant's conduct. These deductions are findings of fact and are subject to the clearly erroneous standard." Nader v. Allegheny Airlines, supra, 167 U.S.App.D.C. at 374, 512 F.2d at 551. With respect to the FBI defendants, the Court is convinced that there was ample evidence for an award of punitive damages.

The question then becomes, with respect to the five FBI defendants, whether the awards were excessive. See Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 83, 366 F.2d 646, 662 (1969) (en banc); Central Armature Works v. American Motorists Ins. Co., 520 F.Supp. 283, 296 (D.D.C. 1980). In a case of this type, in which plaintiffs have an independent statutory basis for recovery of attorneys' fees, punitive damages obviously have no role in compensating them for the costs of litigation. Cf. Central Armature Works v. American Motorists Ins. Co., supra. Nor is there a "profit" wrongfully obtained by the defendants in this case that should be disgorged through the

^{46A/} See, e.g., Healy v. James, 408 U.S. 169, 181 (1972); NAACP v. Button, 371 U.S. 415, 430 (1963).

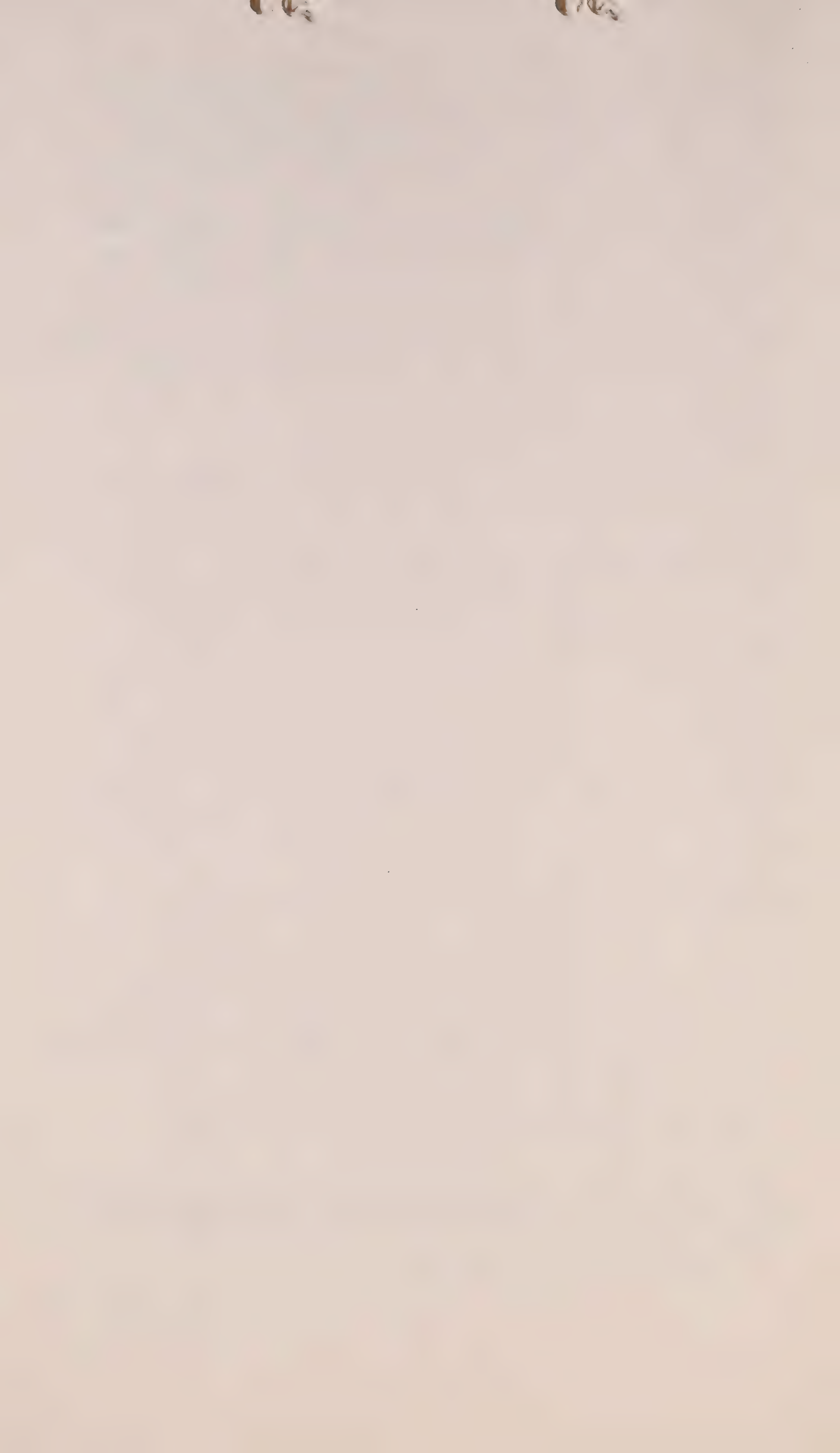


punitive award. Id.^{47/} The sole functions of the punitive damages the jury awarded in this case were to punish and to deter. The Court cannot say that the awards the jury made, substantial as they were, were "larger than should be condoned in simple justice." Afro-American Publishing Co. v. Jaffe, supra, 125 U.S.App.D.C. at 84, 366 F.2d at 663. Confronted with the evidence in this case, the jury could well have decided, in the exercise of calm and dispassionate reason, that the sums it fixed as punitive damages against the FBI defendants were required as a sanction for those defendants' conduct and to ensure that such conduct would not be repeated in the future.

The punitive awards against the two MPD defendants, however, stand on different footing. The jury has broad discretion in determining whether to award punitive damages, and in assessing the amount of punitive damages. See City of Newport v. Fact Concerts, Inc., supra, 101 S.Ct. at 2761. But despite the convincing proof of their participation in conspiracies among themselves and with the FBI defendants, the evidence will not support the punitive awards against the former MPD officers. Although there was evidence that the MPD defendants acted with a bad intent, there is no basis, in the evidence against them, for believing that a punitive award is required to deter similar conduct by MPD officers in the future. COINTELPRO was an FBI activity. The FBI defendants were among its instigators and its leaders. There is no evidence that the key FBI directives, with their call for initiatives to disrupt plaintiffs' associations, embraced the MPD defendants.^{48/} Deterrence of the FBI defendants could reasonably be expected to effect deterrence of all defendants and those who participated with them without

^{47/} The fact that others responsible for damages caused by the conspiracy did not pay their share, cannot be weighed here.

^{48/} See Plaintiffs' Exhibits 1-3.



imposition of separate punitive damages on MPD defendants. Though willing participants in the program to disrupt plaintiffs' activities, the MPD defendants followed the lead of the federal officers in many instances, and appear sometimes simply to have relied unreasonably on their own assumptions about the requirements of public order. However unreasonable a defendant's conduct may have been under the circumstances that confronted him, gross negligence will not justify a punitive award. Chesapeake & Potomac Telephone Co. v. Clay, 90 U.S.App.D.C. 206, 194 F.2d 888 (1952); see also Nader v. Allegheny Airlines, supra. And some evidence of bad intent---enough in this case amply to support the conspiracy verdicts---cannot alone support a punitive judgment unless such an award seems required to deter future misconduct. Whether it is called compensatory or punitive, the whole award granted to a plaintiff and against a defendant in a public action like the present one has a deterrent function. See Owen v. City of Independence, supra, 101 S.Ct. at 1416. Considering the evidence in a light most favorable to plaintiffs' claim for punitive damages, but also bearing in mind the jury's sizeable compensatory awards, the Court has concluded that the punitive judgment against defendants Wilson and Herlihy was not supported by the evidence. Wilson and Herlihy accordingly will have judgment n.o.v. on the punitive damages issue. Cf. Afro-American Publishing Co. v. Jaffe, supra.

IX. Conclusion

An accompanying Order will grant the motions of defendants Wilson and Herlihy for judgments notwithstanding the verdicts assessing punitive damages against them, and deny all other motions. Plaintiffs' prayer for injunctive relief remains under advisement.

Date: May 31, 1982

Louis F. Oberdorfer

UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
Plaintiff,)
)
v.)
)
JERRY V. WILSON, et al.,)
)
Defendants.)
)
)
)
)

Civil Action No. 76-1326

FILED

JUN - 1 1982

ORDER

JAMES F. DAVEY, Clerk

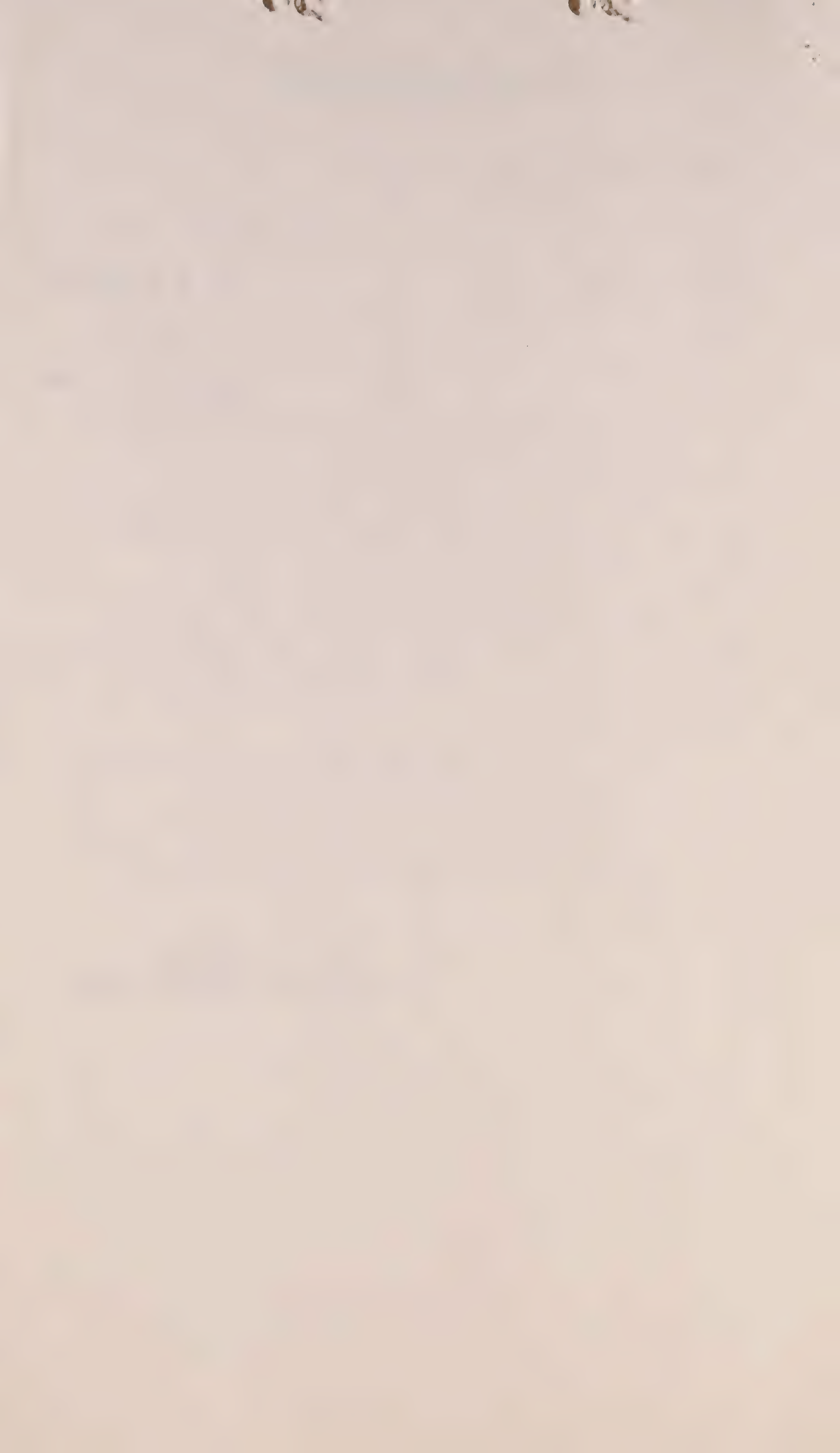
For the reasons stated in the accompanying Memorandum,
it is this 31st day of May 1982 hereby

ORDERED: that the motion of the federal defendants for
judgment notwithstanding the verdict or for a new trial be
denied; and it is further

ORDERED: that the motion of the District of Columbia
defendants for judgment notwithstanding the verdict assessing
punitive damages against defendants Wilson and Herlihy be —
granted; and it is further

ORDERED: that the motion of the District of Columbia
defendants for judgment notwithstanding the verdict or for
a new trial, insofar as it seeks relief other than judgment
notwithstanding the verdict assessing punitive damages,
be denied.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY V. WILSON, et al.,

Defendants.

Civil Action No. 76-1326

FILED

JUN - 1 1982

ORDER

JAMES F. DAVEY, Clerk

The Court is in receipt of plaintiffs' letter of May 12, 1982, regarding their prayer for equitable relief in this action. To permit final disposition of plaintiffs' claims, it is this 31st day of May 1982 hereby

ORDERED: that the parties may file, on or before June 15, 1982, brief memoranda addressing these issues:

1. Whether plaintiffs' claim for an injunction prohibiting reinstatement of certain discontinued FBI and MPD activities that were the subject-matter of their damages claim is moot, or cannot be granted because the remedy at law has been adequate; and

2. Whether plaintiffs' claim for release of their FBI files to them and destruction of all copies to them should be granted; and it is further

ORDERED: that counsel for the federal defendants also indicate in any memorandum they may file whether the Bureau has any files regarding plaintiffs that were not the subject of prior Freedom of Information Act requests, and include in the memorandum a brief description of the Bureau's disposition of plaintiffs' past FOIA requests; and it is further

ORDERED: that the parties may file reply memoranda to the aforementioned memoranda on or before June 22, 1982.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiff :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

REPLY OF D.C. DEFENDANTS TO PLAINTIFFS' STATEMENT
OF THE EVIDENCE RELATING TO HARM

Pursuant to this Court's Order dated April 14, 1982, plaintiffs filed a 33-page statement purporting to establish that the jury's verdicts were not excessive. Scattered throughout that statement were isolated references to the alleged Metropolitan Police Department misconduct and the harm supposedly resulting therefrom. At most, references to injuries allegedly caused by the District of Columbia defendants would occupy a total of approximately 2 pages out of the 33 pages of supposed harms to plaintiffs, the remainder being devoted to injuries allegedly caused by the federal defendants. Even arguendo, if, the few references to the District defendants were accurate, it is clear that the alleged injuries to plaintiffs mentioned therein cannot support the enormous verdicts returned against the D.C. defendants.

Moreover, as demonstrated below, even the few allegations made against the District defendants are not grounded in fact or law:

Tina Hobson: Reference is made to the demonstration held at the U.S. Capitol in May 1972 wherein "agents provocateurs" provoked a police reaction by throwing tear gas canisters. Tina Hobson could not see who started the incident. At best she could only testify that there was disruption in the rear of the Capitol grounds. Importantly, she admitted that this incident had no affect on her



involvement at that demonstration or in any way impinged upon her rights. No other evidence of MPD misconduct affecting her was adduced.

Abe Bloom: Reference was made to a bad check sent to the telephone company alleged by Steve Wilcox, a supposed informant. In fact, the check was covered and telephone service was not disrupted. Thus, no real harm resulted therefrom. Moreover, no evidence was adduced by plaintiffs to prove that Steve Wilcox was in the employ of the MPD. On the contrary, the D.C. defendants produced evidence establishing that they did not employ him. Bloom further claims to have "suffered" harm upon discovering that a trusted co-worker (Jagen) was an MPD officer. The law does not recognize such misplaced trust as a legal injury. See Hoffa v. United States 385 U.S. 293 (1966). No other evidence of MPD misconduct and harm are alleged.

Richard Pollack. Reference is made to unmarked police cars parked in front of his residence. The evidence established that these incidents did not defer this plaintiff in the exercise of his rights. Reference is made to Anne Kolego-Markovich attending PCPJ meetings; her supposedly disrupted role; and her alleged provocations of police reaction. Plaintiffs seem to have forgotten that the jury found her not liable. No other evidence of MPD misconduct and harm are alleged.

Reginal Booker: Reference is made to his participation in the Three Sisters Bridge Demonstration which was disrupted by supposed "agents provocateurs". Not only was such a supposition unproven, but also this plaintiff suffered no harm. Any claim of harm resulting from defendant Bynum's infiltration of groups in which Booker was active must be discounted since the jury found Bynum not liable. Moreover, such infiltration is not improper. See Philadelphia Yrly. Meet. Rel. Soc. of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975). There were no other allegations of MPD misconduct and harm.

Arthur Waskow: No allegations of MPD misconduct and harm are advanced in plaintiffs' statement.

Washington Peace Center: Reference is made to mailing lists taken from their office and informant infiltration. No showing of harm is advanced.


Sammie Abbott: Reference is made to the Three Sisters Bridge Demonstration. No showing of MPD involvement in the disruption is made, nor is any harm proven.


Rev. David Eaton: Reference is made to defendant Bynum attending BUF meetings. Bynum was found not liable. No other evidence of MPD misconduct and harm is advanced.

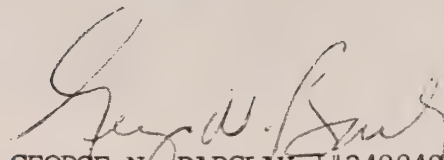
Punitive Damages Against Wilson and Herlihy

Plaintiffs claim that the award of punitive damages against these defendants is justified because they allegedly failed to establish guidelines for the intelligence operation and thereby effectively condoned illegal acts. Certainly, the alleged failure to establish guidelines, even if true, cannot support an award of punitives. See Nader v. Allgheny Airlines, Inc., 168 U.S. App., D.C. 255, 512 F.2d 527, 549-550 (1975), rev'd on other grounds, 426 U.S. 290 (1976).

In sum, the few references contained in plaintiffs' lengthy statement filed April 28, 1982, to injuries supposedly caused by the District of Columbia defendants are not supported by the evidence at trial or by the case law. Moreover, even if these allegations were supported, the paucity of damage claims against the District of Columbia defendants in plaintiffs' own compilation vividly attests to the excessiveness of the verdicts against those defendants.


JUDITH W. ROGERS
Corporation Counsel, D.C.

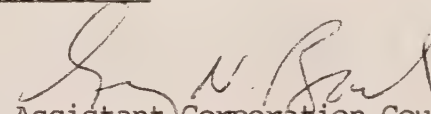

JOHN H. SUDA
Deputy Corporation Counsel, D.C.



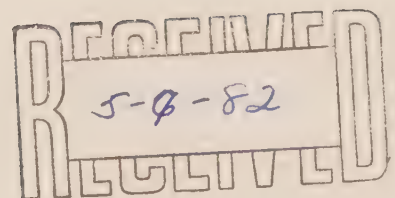
GEORGE N. BARCLAY [#248849]
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Attorneys for District of Columbia
Defendants
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727-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of D.C.
Defendants to Plaintiffs' Statement of the Evidence Relating to Harm,
was mailed, postage prepaid, to Anne Pilsbury, Esquire, Attorney for
Plaintiffs, 17 Danforth Street, Norway, Maine 04268; and David White,
Esquire, Attorney for Federal Defendants, Department of Justice,
Washington, D.C. 20530, this 4 day of May, 1982.



Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
District Building, Room 318
Washington, D.C. 20004



UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

RESPONSE BY FEDERAL DEFENDANTS TO
PLAINTIFFS' STATEMENT OF THE EVIDENCE
AT TRIAL RELATING TO HARM

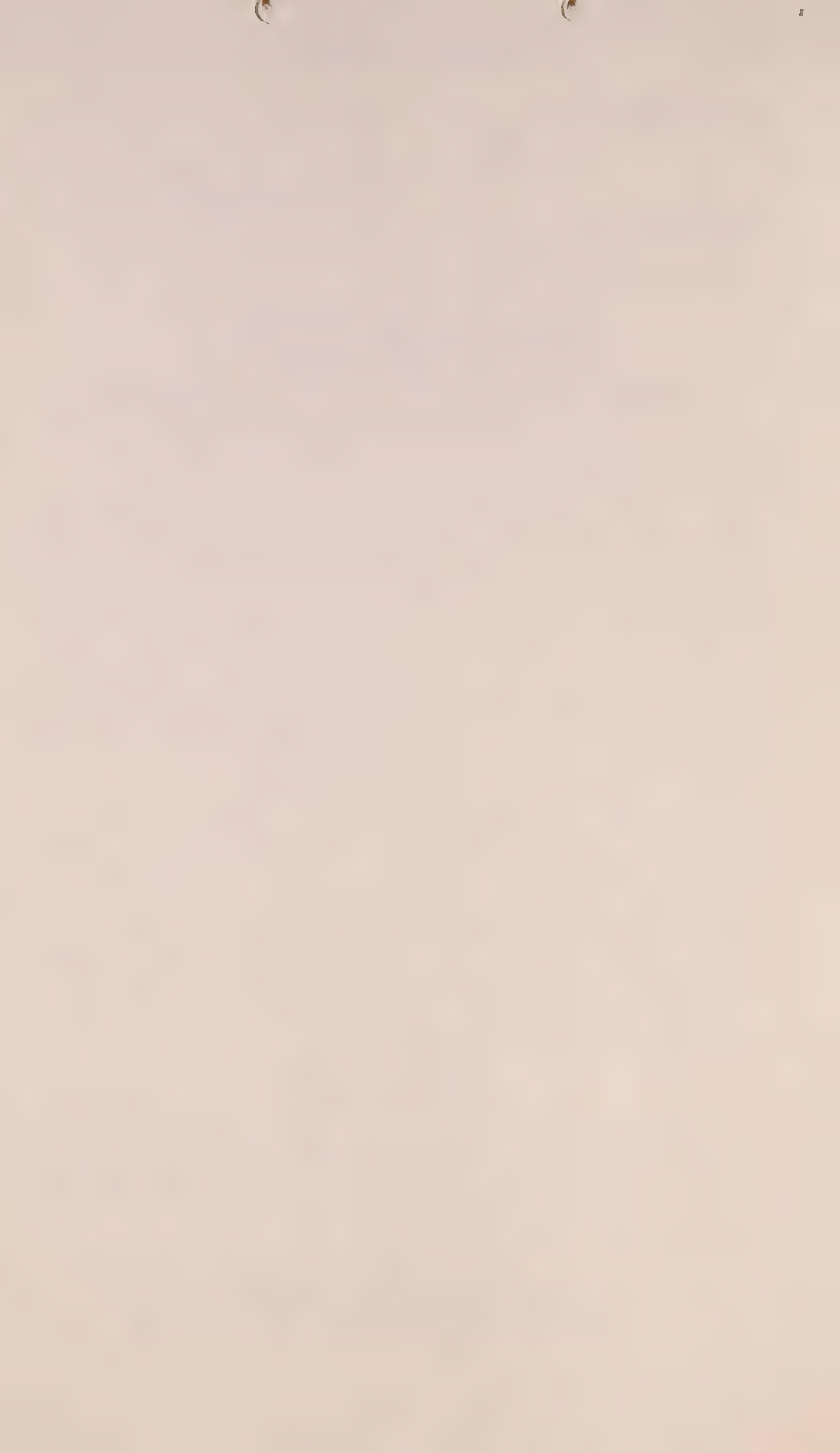
Following trial of this action, the jury returned verdicts in favor of eight of the plaintiffs and awarded damages in the aggregate amount of \$711,937.50. Five of the plaintiffs, Waskow, Bloom, Abbott, Pollock, and the Washington Peace Center, were awarded \$93,750.00 each, and three of the plaintiffs, Hobson, Booker, and Eaton, were awarded \$81,062.50 each. Both the federal defendants and the District of Columbia defendants have argued in their motions to set aside the verdicts that these awards were excessive, and, as a consequence of these arguments, the Court has requested succinct statements from the parties setting forth the specific evidence of damages or lack of damages.

Plaintiffs have submitted a 32 page "Statement of the Evidence at Trial Relating to Harm" which purports to show that the damages awards were reasonable. Accurate analysis of the evidence demonstrates, however, that the awards were not reasonable and, further, that the jury had no evidentiary basis upon which to find each of the federal defendants liable in damages to each of the eight plaintiffs.

EVIDENCE OF DAMAGES

The issues in this civil action relating to plaintiffs' alleged cause of action, and the standards against which their evidence of damages must be measured, were defined in the Final Pretrial Order, dated November 23, 1982:

1. Whether a particular act of a defendant or particular acts of defendants jointly or as alleged conspirators prevented a particular plaintiff on one or more particular occasions



from exercising or interfered with the exercise of rights guaranteed by the First Amendment:

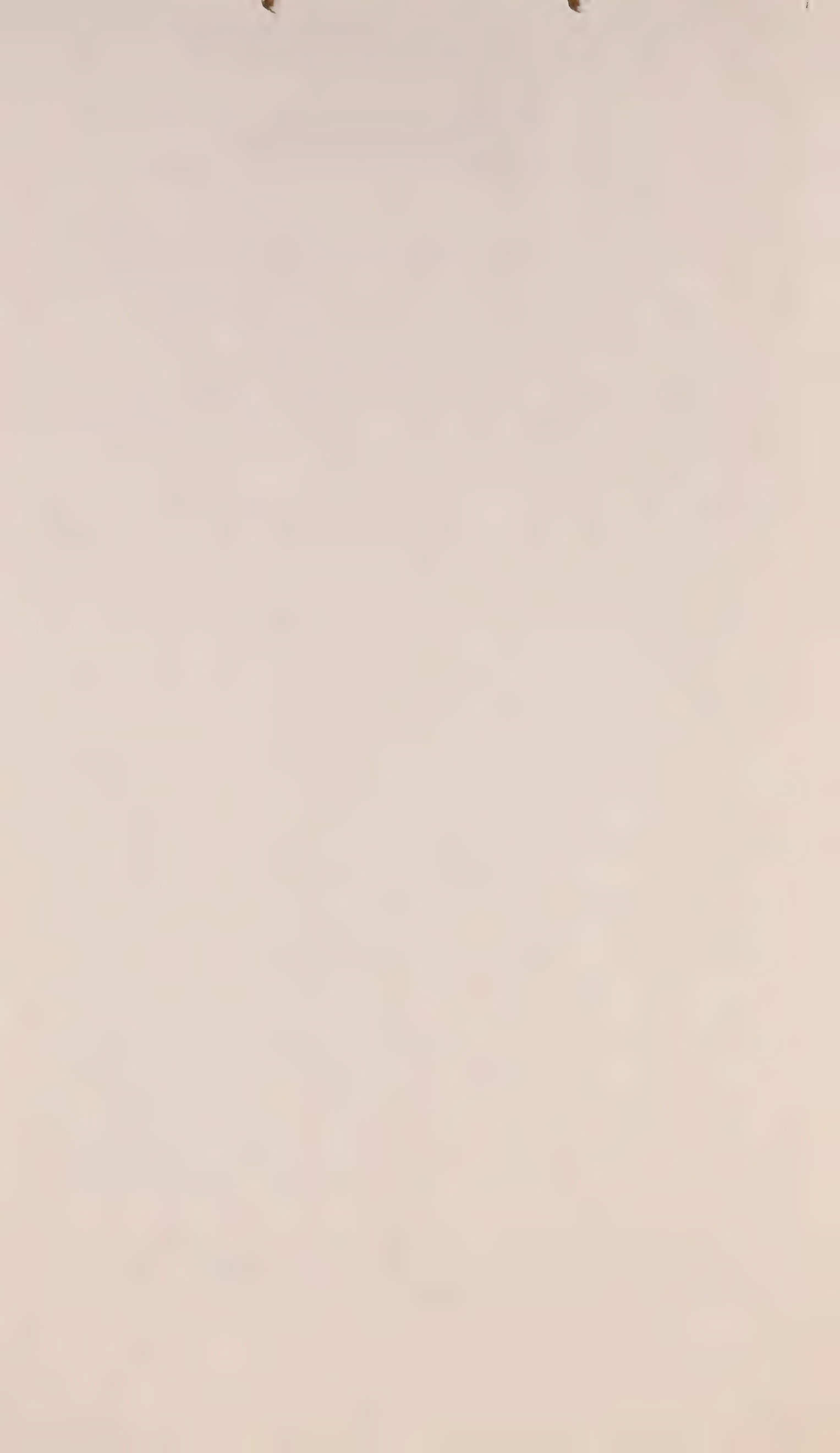
- a. To write
- b. To speak
- c. To assemble (for a "First Amendment purpose") at a particular time and place
- d. To associate (for a "First Amendment purpose") with one or more other particular persons

2. Whether particular defendants were engaged in one or more conspiracies to deprive plaintiffs of First Amendment rights described in II.1 above.

Except for that which is summarized in the federal defendants' motion to set aside the verdict,^{1/} no evidence was presented to the effect that any particular act or acts of the defendants affected plaintiffs much less prevented, or interfered with, the exercise of rights to write, speak, assemble, or associate. The great bulk of plaintiffs' cause of action is based on the notion of conspiracy, and the acts about which they most strenuously complain were committed by persons not defendants and were done without the knowledge or involvement of the defendants. The only thread binding together the "conspirators" was that the defendants and non-defendants were employed by the Federal Bureau of Investigation.

Even in the context of acts by non-defendant conspirators, no plaintiff offered evidence of prevention of, or interference with, the right to speak, to write, or to assemble. Some plaintiffs, including plaintiffs Abbott, Booker, and Waskow, testified of no injury at all. Plaintiff Bloom, and to a lesser extent plaintiffs Hobson and the Washington Peace Center, testified in effect that obstacles were placed in their way in gaining the assistance or attendance of others in connection with their plans for demonstrations. No plaintiff offered direct evidence of mental or emotional distress, though plaintiff Bloom claimed he was upset when he received his FBI file following a Freedom of Information Act request, and plaintiff Pollock, in

^{1/} See Memorandum of Points and Authorities in Support of Motion by Defendants Brennan, Moore, Jones, Pangburn, and Grimaldi for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, at 13-16.



self-contradictory testimony, said he was nervous while talking to two FBI agents for two hours in February, 1973.^{2/}

By its own terms, plaintiffs' "statement" of evidence of damages does not recite evidence regarding injury suffered by each plaintiff but, instead, theorizes as to what the jury "could have found" with respect to each plaintiff. This distinction is crucial, for much of the plaintiffs' case in chief was based on the notion that the jury could "infer" certain facts or conclusions from the evidence; thus, what plaintiffs now portray as what the jury "could have found" is not evidence but the inferences which they declare could have been drawn from the evidence.

The evidentiary principles underlying the jury's ability to make inferences were stated in Washington v. Harris, 502 F. Supp. 1267 (S.D.N.Y. 1980):

An 'inference', sometimes referred to as a 'permissive' presumption, allows, but does not require, the jury to find an ultimate fact to be true based upon proof of another fact if upon consideration of all the circumstances revealed by the evidence they are satisfied that the ultimate fact is more likely than not to follow from the facts proved.

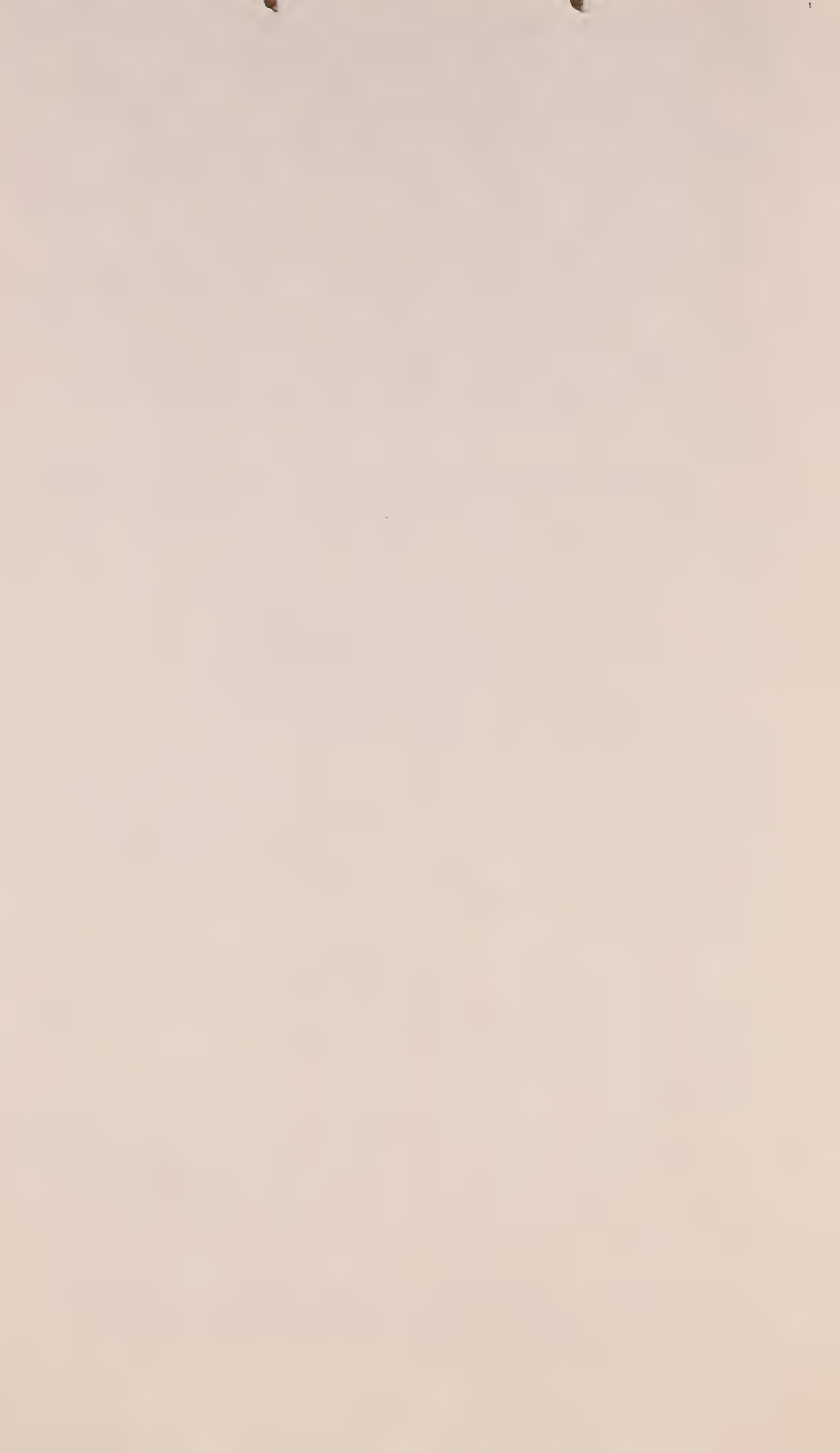
502 F. Supp. at 1271. In drawing an inference, the jury may not ignore uncontradicted testimony, misconstrue the plain meaning of a document, or find one fact to be true as it supports the plaintiffs' claims but find the same fact not true as it supports the defendants' claims.

Without access to the trial transcript, it is difficult to respond in detail to plaintiffs' catalog of inferences, but a few comments may be made as to each plaintiff.

Tina Hobson

1. Based on plaintiff Hobson's testimony and the accompanying exhibits, the jury could not have found that she was investigated by her employer because of a communication from the FBI. Her testimony on cross-examination confirmed that the so-called

^{2/} The agents involved were not named as defendants in this action even though they had identified themselves to Pollock, and plaintiff Pollock had not related this event, prior to trial, as a source of injury.



"investigation" was a brief inquiry initiated solely by her supervisor in which the FBI, and particularly the defendants, were not involved.

2. Plaintiff Hobson presented no evidence that she personally suffered injury because of the actions of any of the federal defendants or the FBI in general. Although evidence was presented regarding proposals made by non-defendants concerning her husband, these activities were not directed at her and did not affect her exercise of First Amendment rights.

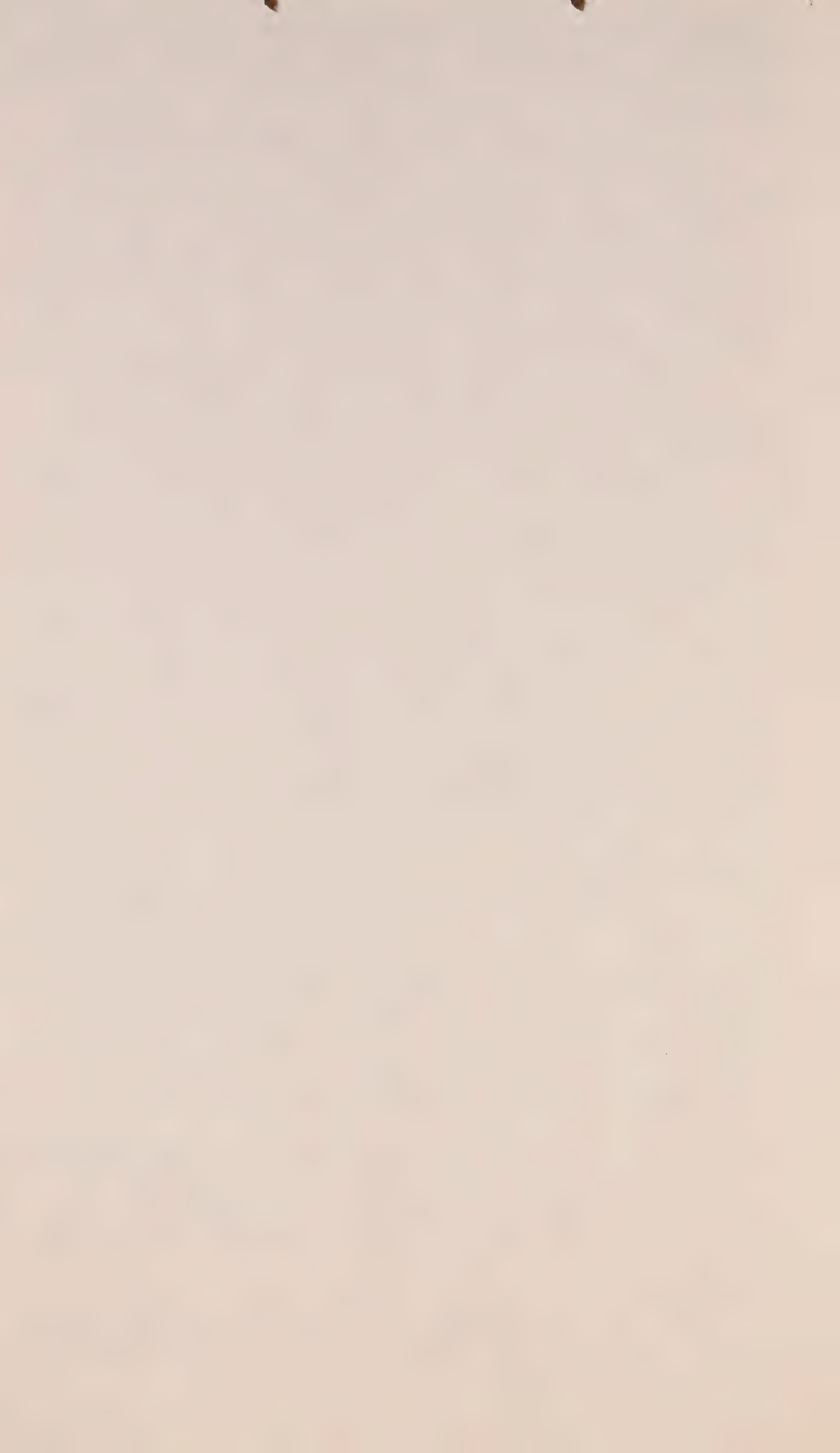
3. Although plaintiff Hobson claims that the efforts to encourage blacks to participate in the anti-war movement were thwarted by Reverend Douglas Moore's "head-tax" proposal, she herself suffered no injury. She was not a member of either the New Mobilization Committee or the Black United Front. Moreover, the uncontradicted testimony was that the "head-tax" proposal, the apparent source of great conflict between the two groups, was purely the idea of Rev. Moore and was an idea which he promoted with great vigor despite the opposition of the leadership of the Black United Front. Furthermore, three of the plaintiffs, Waskow, Abbott, and Booker, supported the idea. Thus, the conflict about which all plaintiffs complain, was not created by the FBI, and particularly not by the defendants, but was exacerbated by the plaintiffs themselves.

4. No evidence, other than pure speculation, supports the inferences (a) that the defendants were responsible for disrupting a demonstration at the U.S. Capitol in May, 1972, or (b) that the defendants caused unfavorable comments regarding the Hobsons' marriage to be published in the media. (In fact, no evidence was produced to show that such comments were published at all).

Abe Bloom

1. As stated above, the "head-tax" proposal was the idea of Rev. Moore and was supported by three of the plaintiffs. The divisive effect of this issue cannot be laid at the door of the defendants.

2. The inferences that defendants interfered with transportation plans at the major demonstrations, e.g., by giving false



directions to bus drivers, or that a financial crisis on the eve of a demonstration was created by an informant, allegedly one Steve Wilcox, acting under defendants' directions are based on speculation. Moreover, if the jury could have found that Wilcox was an informant, then the jury would have had to have found in defendants' favor on the Statute of Limitations, for plaintiffs' and their associates' suspicions concerning Wilcox arose in late 1969 and they proved no equitable tolling of the limitations period on this issue.

3. Plaintiff Bloom offered no evidence, other than his speculation, that the defendants interfered with his business interests by interviewing prospective customers.

4. Plaintiff Bloom's claim of emotional distress is ethereal, uncorroborated, and insufficient to prove injury. See Nekolny v. Painter, 653 F.2d 1164, 1172-73 (7th Cir. 1981).
Richard Pollock

1. The jury could not properly have found that the Rational Observer caused plaintiff Pollock to decrease his First Amendment activity. His own testimony was that immediately after publication of the Rational Observer he was very active in two major demonstrations and on campus expressing his opposition to the war. In addition, there was no evidence that the publication discouraged others from participating in demonstrations and meetings.

2. The jury could not properly have found that plaintiff was entitled to damages for extensive physical surveillance and psychological intimidation by the defendants. If the jury had found that plaintiff suffered such injury and that defendants were responsible (an improper inference in the first place because it would be based on speculation), then the jury would have had to have found in defendants' favor on the Statute of Limitations. It is not rational to conclude that overt intimidation and deliberate concealment can co-exist in the same act, and plaintiff Pollock offered no grounds for tolling of the limitations period on this issue. The February, 1973, interview is particularly pertinent. The agents identified themselves, and if he had been intimidated,

there was no reason why he could not have sued them within the limitations period. He chose instead to sue thirty-nine other agents who had nothing to do with the interview.

Reginald Booker

1. The inference that the so-called "death threat letter" was produced by the FBI, and particularly by the defendants, is based on pure speculation.

2. Booker did not testify that he experienced mental distress as a result of receiving the "Bananas" leaflet, and since the leaflet did not purport to describe him or his views, mental distress cannot be assumed.^{3/}

3. No evidence supports the inference that the activity of defendants was responsible for any conflict between plaintiff Booker and his employer at the General Services Administration.

4. The inference that plaintiff Booker was frightened by the attempt by a non-defendant FBI agent to interview him in 1969 could be reached only by ignoring plaintiff Booker's testimony concerning the event. Plaintiff refused to talk to the agent and sent him away immediately. Furthermore, plaintiff cannot claim injury from this event and also avoid the bar of the Statute of Limitations.^{4/}

Arthur Waskow

1. Plaintiff Waskow supported Rev. Moore's "head-tax" proposal. For the jury to find that defendants are liable to him because of the conflict he engendered on this issue would be an extreme injustice.

^{3/} In any event, the testimony of defendants was uncontradicted that no defendant was aware of or involved in the creation or distribution of this leaflet. Plaintiffs' aver that defendant Brennan approved the leaflet (Plaintiffs' Statement, at 11). This is patently false, see Plaintiffs' Exhibit 24, for defendant Brennan never saw the leaflet.

^{4/} At trial, plaintiff Booker testified at length concerning a chance meeting with defendant Gerould Pangburn in April, 1972. The omission of this event from plaintiffs' Statement suggests that plaintiffs acknowledge no injury to Booker was caused by the meeting. There was no other evidence that defendant Pangburn committed an act affecting plaintiffs.

2. No evidence supports the inference that defendants wrongfully acquired plaintiffs' papers. It would be pure speculation that (a) the papers were wrongfully received by the FBI and (b) the individual defendants were involved in receiving them.

3. The jury could not properly find simultaneously that plaintiff Waskow was injured by the neighborhood interviews occurring in 1970 and that the claim was not barred by the Statute of Limitations. Furthermore, no evidence supported any inference that any defendant was involved in the interviewing.

Washington Peace Center

1. No evidence suggested that any defendant was involved in investigating the Washington Peace Center.^{5/}

2. The Washington Peace Center's activities as planners and participants in demonstrations were not affected by the alleged disruption of housing arrangements and communications. Moreover, no evidence demonstrated that any defendants was involved in that activity.

Sammie Abbott

1. Plaintiff testified as to no injury. Furthermore, he testified he supported the "head-tax" proposal which caused conflict within the anti-war movement.

2. The jury could not properly find simultaneously that plaintiff Abbott was injured by the contacts with Special Agent Wilson, which occurred prior to 1973, and that the claim was not barred by the Statute of Limitations. Plaintiff Abbott did not claim to have felt intimidation, harassment, or distress as a result of these encounters. No evidence demonstrated that any of the defendants were aware of or involved in these events.

^{5/} Federal defendants have not been able to identify Exhibit 102-37c referred to by plaintiffs, and so no comment can be made concerning it. The examination of bank accounts referred to in Exhibits 102-6 and 102-10 occurred in 1966 and 1967. This examination was not of WPC accounts, was not violative of the Fourth Amendment, see U.S. v. Miller, 425 U.S. 435 (1976), and did not involve any defendant.

3. No evidence demonstrated that any defendant was aware of or involved in the examination and copying by Special Agent Wilson of plaintiff Abbott's bank records. Exhibits 95-1 through 95-12 reflect that this activity occurred in 1964 to 1966, prior to the commencement of the alleged conspiracy. Examination of bank records is not in violation of the Fourth Amendment. United States v. Miller, 425 U.S. 435 (1976). Plaintiff did not testify that he suffered mental distress for this or any other matter.

4. The inference that the demonstration at the site of the Three Sisters Bridge in November, 1969, was disrupted by defendants or their agents could be based solely on speculation.

David Eaton

1. The jury could not properly find that plaintiff Eaton is entitled to damages from defendants because of the conflict over the "head-tax" issue; Rev. Moore testified that it was his idea and he pursued it despite the opposition of the Black United Front leadership. Moreover, three of the plaintiffs themselves, particularly plaintiff Waskow, exacerbated the conflict by vigorously supporting the proposal.

2. No evidence, other than speculative testimony, supported the inference that the so-called "death threat letter" was produced by the FBI or by the defendants. There was also no evidence that the letter injured plaintiff Eaton regardless of by whom it was written.

3. Plaintiff Eaton offered no testimony or other evidence that his activities in behalf of the Poor People's Campaign were interfered with by defendants. Even if the jury found that the proposed press releases were published, and there was no direct evidence that they were, there was no evidence that the information was false or that its publication damaged plaintiff Eaton. See Paul v. Davis, 424 U.S. 693 (1976).

4. The allegation that the FBI placed an informant in plaintiff Eaton's church who undertook to "split the church" is a deliberate misconstruction of the exhibit referred to. As plaintiff Eaton himself testified, the document reflects that an informant was aware that another person had introduced a resolution which could result in conflict in the church, not that the

informant himself was so involved. No evidence, including the informant report itself, supports an inference that the FBI, and particularly the defendants, were handling informants involved in the activities of plaintiff Eaton's church.^{6/}

PUNITIVE DAMAGES

In the absence of proof that the defendants were personally aware of or participated in the activity complained of, plaintiffs are hard put to establish that defendants acted with the malice or reckless indifference which would justify a finding of punitive damages. Considering the energy with which plaintiffs have pursued the five federal defendants and the vigor with which they have proclaimed that government agents have special responsibilities to protect the rights of citizens, there must arise a question as to why plaintiffs have shown such indifference to those agents personally and actually involved in the acts which plaintiffs have portrayed as heinous and venal. A genuine interest in prosecuting a claim against a wrongdoer would generally mandate something other than an arbitrary selection of defendants.^{7/}

CONCLUSION

For the foregoing reasons, and for reasons previously stated, the damage awards were excessive and the verdicts were not based on the evidence.

Respectfully submitted,

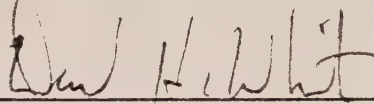
J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

^{6/} As is typical with plaintiffs' case, no evidence demonstrates that any defendant was aware of or involved in this matter. It is of no passing significance that the agent who received the informant report, John Stanley, had been a defendant but was voluntarily dismissed on the eve of trial.

^{7/} The pernicious effect of plaintiffs' approach and of the application of the conspiracy theory is obvious. The defendants are held accountable for acts about which they had no knowledge, and, being ignorant of the circumstances, they cannot fashion a rudimentary good faith or factual defense.

BROOK HEDGE



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Attorneys for Defendants
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and Pangburn

CERTIFICATE OF SERVICE


I hereby certify on this 4th day of May, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Response by Federal Defendants To Plaintiffs' Statement Of The Evidence At Trial Relating To Harm.

Herb Semmel, Esquire
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1624 Crescent Place, N.W.
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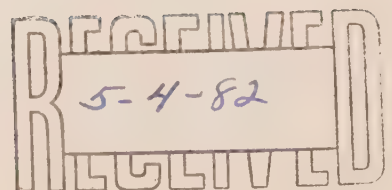
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Attorney, Department of Justice
Washington, D.C. 20530



Rec'd 4.5/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendant :

THE DISTRICT OF COLUMBIA DEFENDANTS' STATEMENT
ON DAMAGES IN RESPONSE TO THIS COURT'S ORDER
OF APRIL 14, 1982

Introduction

On December 23, 1981, the jury returned verdicts in favor of eight plaintiffs in the total amount of \$711,937.50. These verdicts are not only unsupported by the evidence but also are excessive and bear no reasonable relationship to the injuries, if any, proven by plaintiffs. In general, the supposed injuries to plaintiffs were largely subjective, and even plaintiffs do not claim to have realized there was any invasion of their rights until long after the acts had been allegedly committed. As such, any real or imagined harm to plaintiffs was insubstantial and diluted by the passage of time.

On April 14, 1982, the Court invited the parties to file brief statements of the evidence supporting their contentions on the issue of damage. As will be more fully developed below no plaintiff produced evidence justifying the enormous verdicts returned.

Specific Items or Evidence Demonstrating Absence of Damage

A. Sammie Abbott.

This plaintiff was awarded \$93,750. Mr. Abbott testified mainly about his role in ECTC and the November 16, 1969 demonstration at

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the Three Sisters Bridge site. He testified that ECTC was infiltrated by Harold Bynum whom he later discovered to be an officer with the MPD. Bynum was described as never being disruptive during the meetings and as rarely, if ever participating in any of the discussions. Further, he never advocated violence or confrontation. Indeed a warm relationship developed between Officer Bynum and Mr. Abbott. Importantly, the jury returned a verdict in favor of Officer Bynum finding that he did not violate any of the plaintiffs protected rights. Accordingly, this plaintiff suffered no damage as a result of the infiltration by Officer Bynum of the ECTC.

The only other evidence relating to plaintiff Abbott's claim against the District defendants relates to the November 16, 1969 demonstration. In this regard he testified that the demonstration was staged at Georgetown University. He stated that an unidentified MPD officer had warned him not to march down to the site of the Three Sisters Bridge or that the demonstrators would be tear gassed. He further testified that he instructed the demonstrators not to march down to the site, but that two white males from the crowd interrupted him and called him a "sell-out". Abbott testified that he left the demonstration before a splinter group marched off the campus to the bridge site. In 1974 someone identified one of the provocateurs to Abbott as Jan Francis, an MPD officer. There was no testimony that Jan Francis was an officer in the Intelligence Division or under the supervision of any of the named defendants.

Accordingly, the only injury suffered by this plaintiff was the supposed loss of an opportunity to demonstrate in the November 16, 1969 demonstration. Given the extremely tenuous connection between this supposed loss and any act committed by



any of the District of Columbia defendants any liability based thereon is speculative at best. Assuming arguendo liability in this instance, the damages awarded to this plaintiff are clearly excessive and lacking any rational relationship to the evidence.

B. Abe Bloom.

This plaintiff was awarded \$93,750. He testified that while active in the Washington Area Peace Action Coalition (WAPAC), he became acquainted with defendant Jagen who had infiltrated the group as an undercover officer in the Intelligence Division. While Jagen attended meetings and did volunteer work, the testimony revealed that he never removed anything from the WAPAC offices or in any way disrupted their activities. Plaintiffs advanced no other testimony or evidence regarding this plaintiff, WAPAC or any other District of Columbia defendant.

Accordingly, the supposed injuries suffered by plaintiff Bloom were limited to injuries, if any, resulting from the minimally intrusive infiltration undertaken by defendant Jagen. Such an infiltration cannot even support a finding of liability, let alone any damage to plaintiff Bloom.

C. Reginald Booker.

This plaintiff was awarded \$81,062.50. Plaintiff Booker testified that he became acquainted with defendant Bynum in 1968 at which time he was active in an organization known as the Emergency Committee on the Transportation Crisis (hereinafter referred to as ECTC). Booker testified that defendant Bynum began attending meetings of this organization and even accompanied him to a convention in Toledo, Ohio. At these meetings defendant Bynum never took an active part in the discussions nor attempted to change the peaceful orientation of the organization to more radical means.

In 1969, plaintiff Booker was informed by someone that defendant Bynum was a police officer. Booker testified that he did nothing further at that time to investigate these allegations against Bynum. A year later, in 1970, Booker was again informed that defendant Bynum was a police officer. Booker testified that the source of his information was a friend who had seen Bynum in full police uniform at District Court. Plaintiff Booker did not recall seeing defendant Bynum again and he testified that Bynum stopped attending meetings of ECTC in 1970.

The testimony at trial revealed that the only injuries alleged by plaintiff Booker with respect to District defendants resulted from the presence of defendant Bynum at ECTC meetings. Defendant Bynum testified that he was attending these meetings in order to ascertain the location of future demonstrations, number of people predicted to attend and the purpose of the demonstration. Bynum testified that he believed this assignment to be a necessary and lawful activity to assist the police department in monitoring demonstrations. As noted above, this sort of investigative activity which does not cause or threaten specific objective harm does not violate the constitutional rights of plaintiffs, and allegations or proof of subjective "chill" in the exercise of rights is not compensable in damages. Laird v. Tatum, supra, 408 U.S. 1 (1972). Moreover, the jury found defendant Bynum to be not liable. Since there was no other evidence of illegal acts by District of Columbia defendants resulting in injuries to this plaintiff, the verdict against the District of Columbia defendants and resulting damage awarded to this plaintiff were clearly unsupported.

D. David Eaton.

This plaintiff was awarded \$81,061.50. He did not testify to any damages which were proximately caused by any of the



District of Columbia defendants. The only other testimony in this respect came from defendant Bynum concerning his attendance of Black United Front (BUF) meetings for approximately a year. Since defendant Bynum was found not liable such activities clearly cannot support an award of damages against the District of Columbia defendants.

Accordingly, the verdict and damage award in favor of this defendant is clearly against the weight of evidence with respect to the District of Columbia defendants.

E. Tina Hobson.

This plaintiff was awarded \$82,062.50. No evidence was presented at trial justifying a verdict against the District of Columbia defendants. The one incident arguably involving the Metropolitan Police Department was her testimony that a demonstration she attended was interrupted by smoke bombs set off, she believed, by the police. As a result, the demonstration was not as orderly as planned and she claimed a loss of her First Amendment Rights. On cross-examination, she admitted that she didn't see the police set off the bomb. Indeed given the distance between her and the incident, there was no way she could have seen who actually set off the smoke bombs. She conceded that this incident had no real effect on her political involvement during the relevant period.

F. Richard Pollack.

This plaintiff was awarded \$93,750. Plaintiff Pollack testified that he was active in numerous organizations during the relevant period of time involved in this lawsuit. In the summer of 1971 he became acquainted with defendant Ann Kolego Markovich through her work as a volunteer in the office of the Peoples Coalition for Peace and Justice (hereinafter PCPJ). According to the testimony of Pollack, defendant Kolego Marovich attended numerous meetings of PCPJ and was often "volatile and disruptive" during these meetings.

He testified that during one meeting defendant Kolego Markovich suggested that members of PCPJ push over buses in front of the White House in order to be noticed. These suggestions were not accepted by the majority of the members of the organization. Pollack also testified that he had seen defendant Kolego Markovich at a demonstration at the Capitol Building in the fall of 1971 and saw her yelling profanities at the police in addition to throwing objects at these police and urging others attending the demonstration to do the same.

However, the jury either did not believe plaintiff Pollack's testimony or they determined that defendant Kolego Markovich's conduct did not warrant a finding of liability against her, since the jury returned a verdict in her favor. Given that there was no other testimony presented by plaintiff Pollack to support his claim of injuries by the D.C. defendants, the verdicts returned against the other D.C. defendants are clearly unsupported by the evidence.

G. Arthur Waskow.

Plaintiff Waskow testified that during the relevant times periods involved in this lawsuit he was employed at the Institute for Policy studies (hereinafter IPS) in addition to being active in numerous anti-war organizations. Waskow testified that in 1971 he became acquainted with Robert Merritt, a volunteer who worked at IPS and was later identified to Waskow as an informant for the Metropolitan Police Department. Plaintiff Waskow testified that his relationship with Merritt was tenuous at best, because he doubted the credibility of Merritt and always felt that his "demeanor appeared to be a little shaky." The only other evidence presented at trial with respect to injuries allegedly sustained by plaintiff Waskow by the Metropolitan Police Department was a note in his FBI file that the Metropolitan Police Department had gotten a typewriter ribbon from Waskow's typewriter and turned it over to the FBI. Moreover, plaintiff Waskow did

not testify as to any damages sustained as a result of these incidents.

The only other evidence that was presented with respect to plaintiff Waskow came from a sworn statement of Charles Marcum. In his statement Marcum indicated that he had monitored a frequency and intercepted the voice of Arthur Waskow. There was no indication from the statement whether this interception was made pursuant to a lawful wiretap or with the consent of one party.


Based on the testimony presented at trial there was no evidence that plaintiff Waskow was injured by any of these incidents or that any of the District defendants were directly involved in any improper conduct. Under these circumstances, verdicts returned against the District of Columbia defendants is clearly unsupported by the evidence.


H. Washington Peace Center.

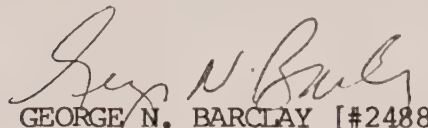
The plaintiff was awarded \$93,750. The only evidence introduced against the District of Columbia defendants was a portion of the statement of Thomas Okeson, a former member of the MPD who stated that he used to hang around the Washington Peace Center and copy addresses that were on their file cards. No testimony was adduced by any of their representatives as to any damage that may have resulted from such activity. Accordingly, a damage award based solely on that statement is purely speculative.

CONCLUSION

It is clear that plaintiff presented little or no evidence of compensable injuries caused by the activities of the MPD defendants. Given the nature of the MPD activities, by and large confined to legitimate intelligence gathering, the verdicts returned against the District of Columbia defendants are not only excessive but also clearly against the weight of evidence.

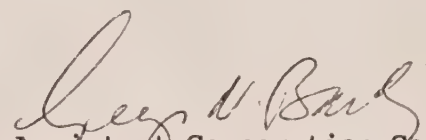

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing District of Columbia Defendants' Statement on Damages in Response to this Court's Order of April 14, 1982, was mailed, postage prepaid, to Anne Pilsbury Esquire, Attorney for Plaintiffs, 17 Danforth Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 29 day of April, 1982.


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Attorney for District of Columbia
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Record 51082
UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.) Civil Action
) 76-1326
JERRY WILSON, et al.,)
)
Defendants.)

MEMORANDUM BY FEDERAL DEFENDANTS ON
EVIDENCE OF LACK OF DAMAGES

By order of April 14, 1982, this Court requested the parties to submit succinct statements of the specific evidence they relied on as proof of damages or lack of damages. In their memorandum in support of their motion to set aside the verdict, the federal defendants reviewed the evidence regarding the injuries, vel non, suffered by each plaintiff as a result of the personal activities of the individual defendants. (Memorandum of Points Authorities in Support of Motion by Defendants Brennan, Moore, Jones, Pangburn, and Grimaldi for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at 13-16.) In the absence of the trial transcript, the federal defendants are unable to provide further citation to specific testimony demonstrating that plaintiffs suffered no injury for which defendants should answer in damages.

On the basis of all the testimony, plaintiffs proved no actual deprivation of constitutional rights caused by the conduct of the federal defendants. No plaintiff testified or presented other evidence that he or she on any occasion was prevented from speaking, writing, organizing, attending a meeting, or hearing a speech.

One plaintiff, Abraham Bloom, testified that he suffered mental distress. He stated that he became disturbed and upset upon examining his Federal Bureau of Investigation file and discovering that a friend of his had provided information to the FBI. This testimony was insufficient to prove injury. In Nekolny v. Painter, 653 F.2d 1164 (7th Cir. 1981), plaintiff had been improperly terminated from public employment due to his exercise of First Amendment rights. Citing Carey v. Piphus,

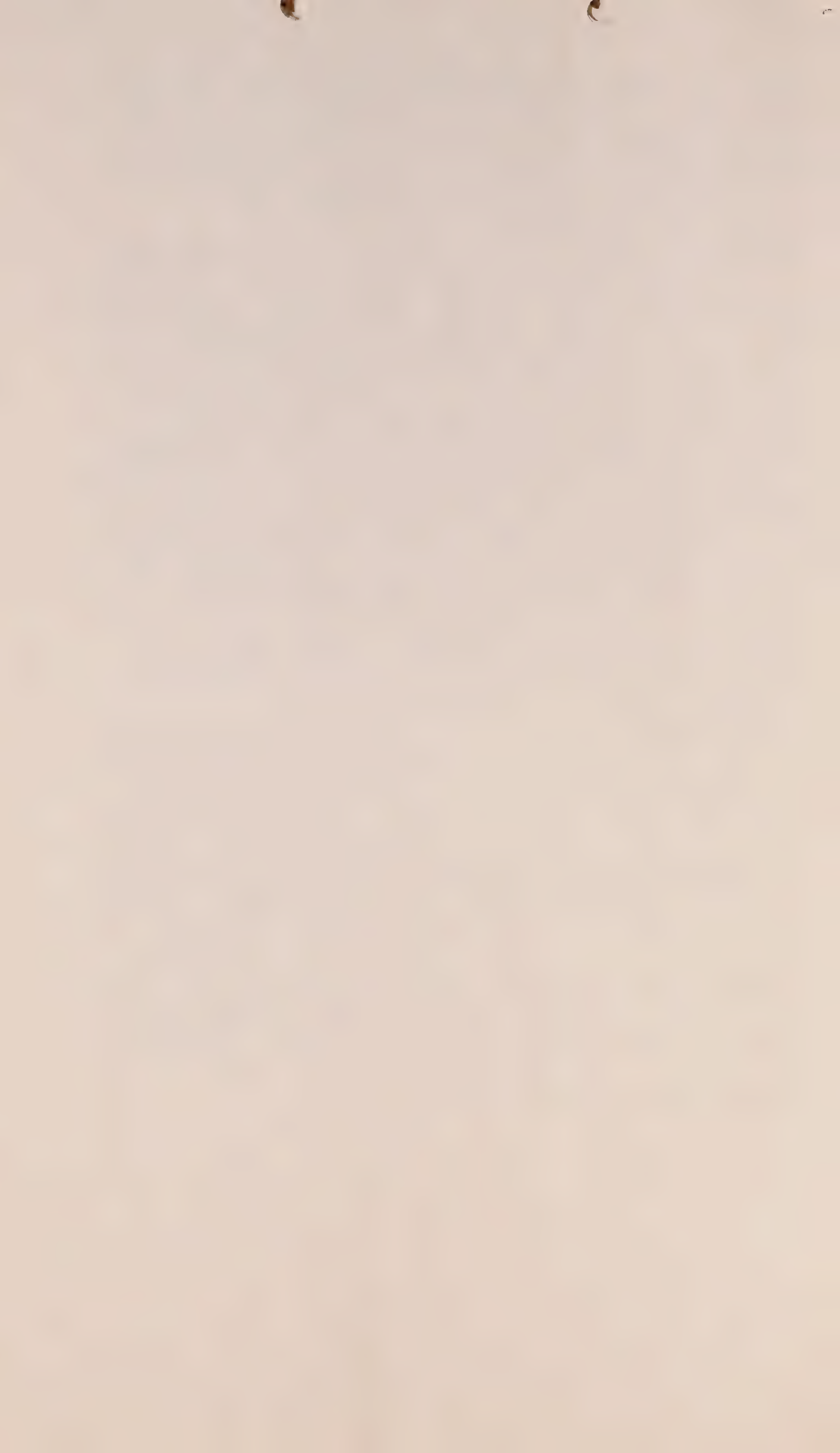
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435 U.S. 247 (1978), the court found that plaintiff's testimony that he was "very depressed", "a little despondent", and "completely humiliated" was not sufficient to prove an injury of mental and emotional distress for which damages could be awarded. 653 F.2d at 1172-73.

Certain plaintiffs implied that their rights of association were infringed by acts of the FBI. (There was no evidence, however, that the individual defendants were personally aware of or involved in the acts at issue.) In any event, where the plaintiffs themselves suffered no diminution of the opportunity to exercise their rights, damages are not awardable. In Familias Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980), the court found that a Texas statute violated the First Amendment and caused a decline in membership and participation in the plaintiff organization; however, even though the individual plaintiff, a member of the organization, suffered an infringement of the right of association, only nominal damages were recoverable. 619 F.2d at 402.

Even if the Court should find that the jury could properly find the federal defendants to be liable, the damages awarded were extraordinarily excessive. Carey v. Piphus, 435 F.2d 247 (1978)(Nominal damages appropriate where due process rights were violated but no actual injury was incurred); Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977)(Award of \$7500 for arrest in violation of First Amendment was totally out of proportion to any harm actually suffered); but see Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977)(Award of \$100 for arrest in violation of First Amendment was insufficient).



CONCLUSION

For the foregoing reasons and for the reasons set forth in federal defendants' motion to set aside the verdict, the verdict in this case was not supported by the evidence and the damages awarded by the jury in this action were excessive. The federal defendants, therefore, are entitled to judgment notwithstanding the verdict or to a new trial.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

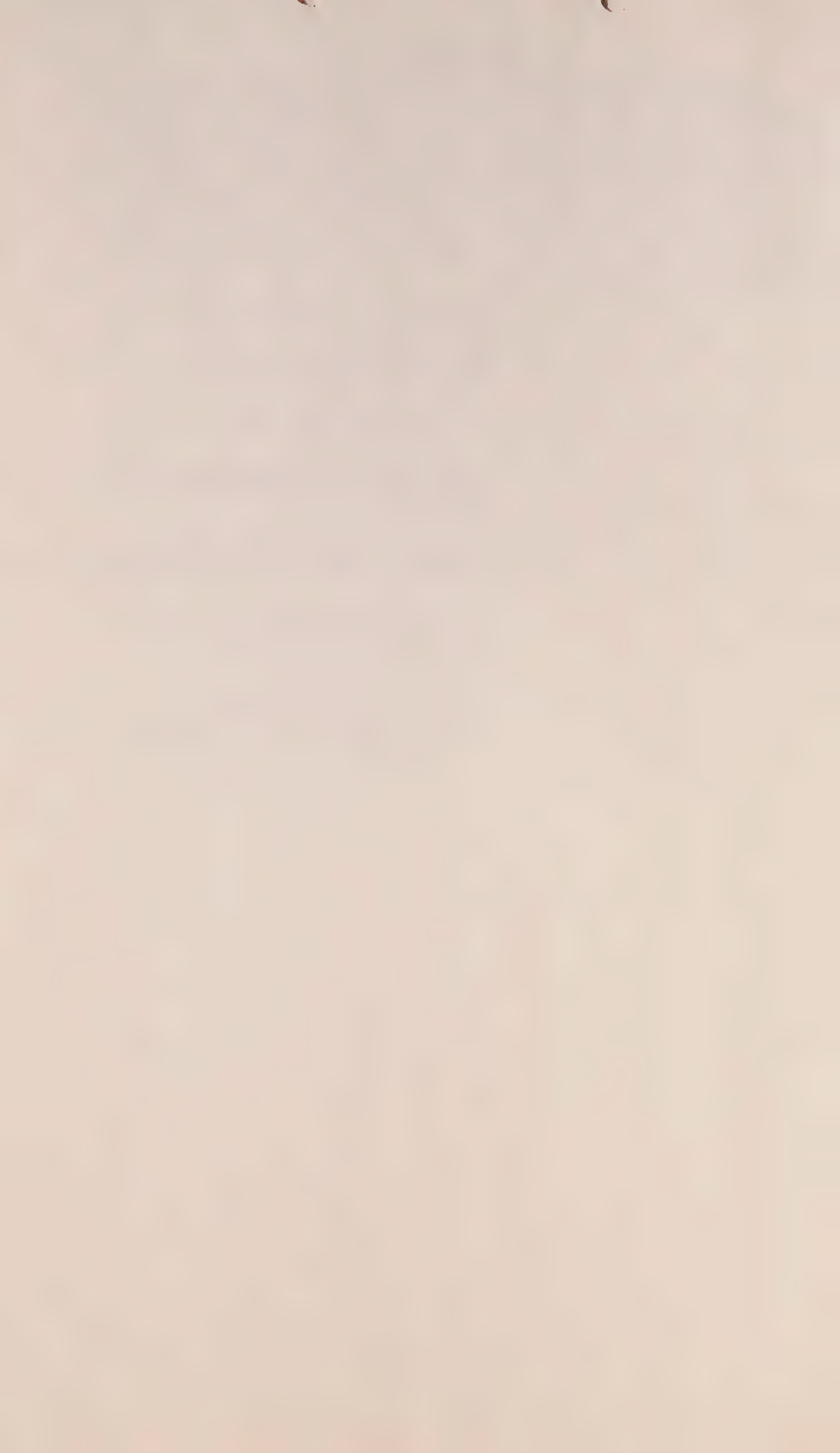
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CERTIFICATE OF SERVICE

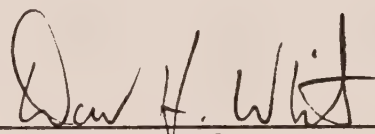
I hereby certify that on this 29th day of April, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Memorandum By Federal Defendants on Evidence of Lack of Damages.

Herb Semmel, Esquire
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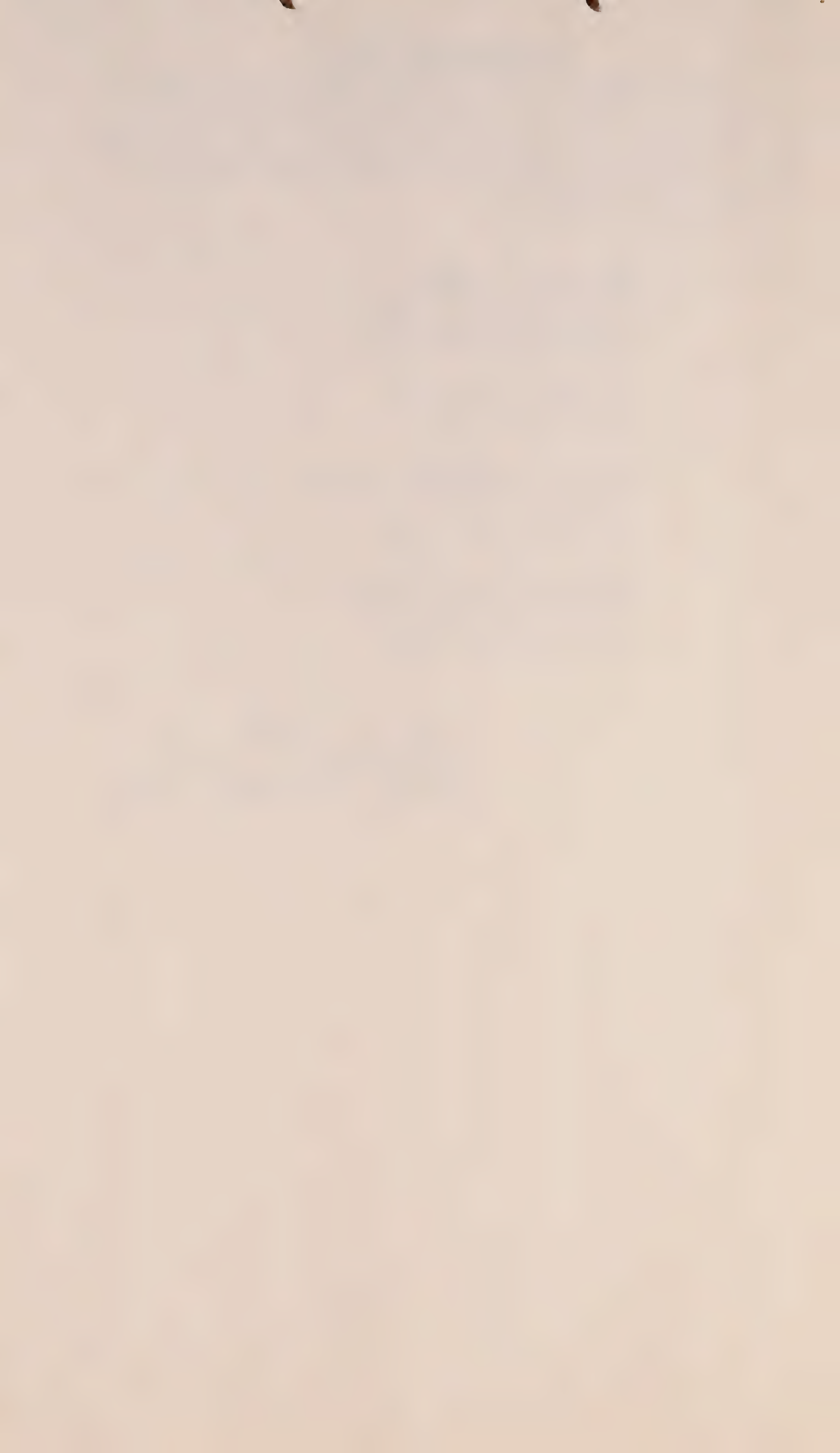
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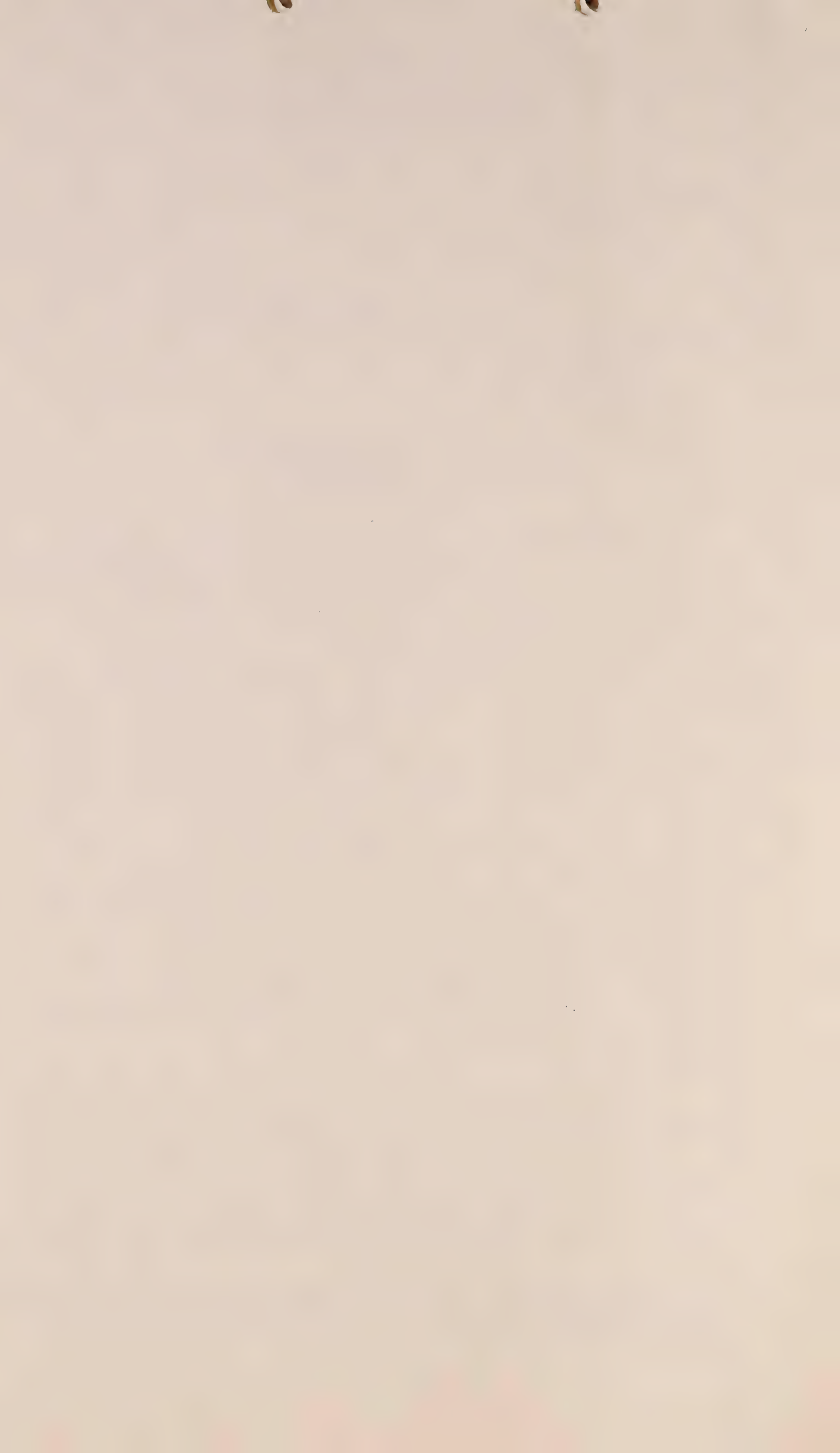


JULIUS HOBSON, et al.,)
)
 Plaintiffs)
)
 v)
)
 JERRY WILSON, et al.,)
)
 Defendants)
)

JERRY WILSON, et al.,
Defendants

Sometimes the FBI targeted individual plaintiffs for action and other times the plaintiff was affected simply because he or she was in a group or associated with someone whom the FBI wished to disrupt or discredit. Most of the actions complained of in this case were directed toward groups or broad public movements and hence the injury suffered is a shared one and

1/ The trial transcript will not be available from the court reporter until on or about June 17, 1982; therefore, references to transcript are based on counsel's memory and notes.



difficult to measure on an individual basis. In addition the injuries are to intangible rights but are no less real for this fact.

Where the tort itself is of such a nature as to preclude ascertainment of damages with certainty, it would be a perversion of the fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his act.

Story Parchment Co. v Paterson Company, 282 U.S. 555,563(1931).

The types of injuries suffered by the plaintiffs in this case can be divided into two categories: those in which the injury is shared by others and arises out of membership or activity in a targeted political group or movement, and those injuries which for whatever reason are felt only by that plaintiff. Evidence of these injuries, discussed in detail in Part One and Part Two, can be briefly summarized as follows.

A. Summary of Injuries suffered by all plaintiffs

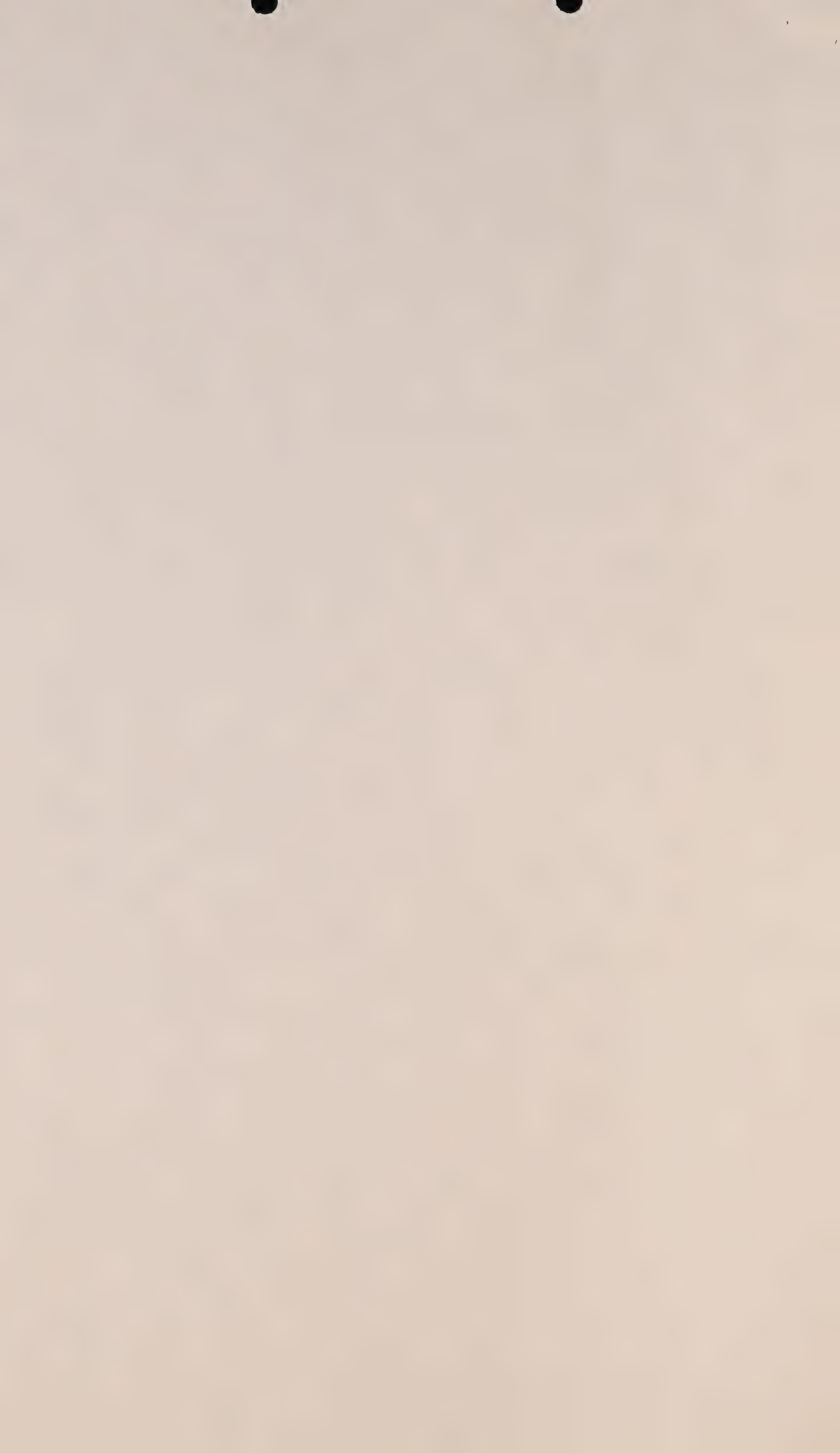
All the plaintiffs were active participants in the anti-war movement. While for plaintiffs Booker and Abbott, the war issue was secondary to their efforts in organizing the anti-freeway forces in Washington, D.C., the evidence showed they both gave substantial time and energy to the peace movement. (Testimony of all plaintiffs; Exhibits 95-103) All plaintiffs testified to the importance to them of creating coalitions between black and white people on common social problems, notably the Vietnam war and the threat of urban freeways. As participants in and organizers of the anti-war effort, the plaintiffs desired to attract as many people as possible to join with them in mass, peaceful protests against the war. (Tr.____, Bloom, Hobson). All shared a desire for an early end to the war and to achieve this, struggled tirelessly to place the public's dissatisfaction with the war before the Nation's leaders by means of semi-annual "mobilizations" in which the plaintiffs and thousands of others spoke to the government in the most effective fashion they could find: by their massed presence. The evidence showed that the plaintiffs participated in organizing the following major First Amendment activities in Washington, D.C. in 1964-1974:

January 20, 1969	Counter-inaugural activities
October 15, 1969	Vietnam Moratorium Day (mass rally)
November 13, 1969	March Against Death
November 15, 1969	Mass rally at Washington Monument
May 9, 1970	March and mass rally at Ellipse to protest Cambodia bombing
April 24, 1971	March and mass rally at Ellipse
October, 1971	"Nixon eviction" demonstrations
May, 1972	demonstration at U.S. Capitol
June, 1972	demonstration at U.S. Capitol

None of the plaintiffs could remember all of the demonstrations that he or she participated in but plaintiff Bloom testified that as a rule "we tried to have something in the Spring and something in the Fall". (Tr. ____, Bloom.) Tina Hobson testified that they kept planning demonstrations until the war ended. (Tr. ____, Hobson). These demonstrations were lawful, peaceful protests for which the organizers obtained parade permits in advance. (Tr. ____, Wilson).

The following acts of the defendants affected the success of one or more of these demonstrations and hence injured each of the plaintiffs.

1. Disruption of housing plans for out-of-town demonstrators: January, 1969. (Exhibits 13,14; Tr. ____, Kaufman)
2. Disruption of Marshalls' radio communications: January, 1969. (Exhibits 15, 16)
3. Throwing tear gas cannisters to provoke police reaction at U.S. Capitol demonstration; May, 1972. (Tr. ____, Hobson, Pollock, Collum.)
4. Publication of The Rational Observer to deter American University students from participating in demonstrations. (Exhibit 27; Tr. ____ Pollock, Grimaldi.)
5. Cancellation of buses to bring students from Ohio to demonstration; January, 1969. (Exhibit 105.)
6. Creation of animosity and tension within the New Mobe and between the New Mobe, its supporters and the Black United Front and its supporters by sending fictitious letters and leaflets. The jury could have found that the tensions thus created lasted long beyond the day or month in which the fabricated document was received. ("Fly United" leaflet, Exhibit 31-A; "Bananas" leaflet, Exhibit 23; "Disgruntled black" letter, Exhibit 31; Rev. Moore letter, Exhibit 17; Tr. ____, Bloom, Moore, Peck, Gurewitz, Eaton, Abbott, Booker.)



7. Last minute near-cancellation of telephone service at New Mobe office by writing bad checks to telephone company, causing financial cash-flow crisis. (Tr.____, Gurewitz, Bloom, Peck)
8. Smashing or otherwise making inoperative xerox machine used by peace groups at 1029 Vermont Ave. N.W. (Exhibit 90, statement of Spiker; "...they were ordered, I don't know by who, to smash all their duplicating equipment," and Tr.____,Peck; there had been a particularly serious malfunction right before a major demonstration.)

In addition to direct interference in planned First Amendment activities, the defendants injured the plaintiffs by placing informants in their organizations not simply to collect information, cf. Laird v Tatum, 408 U.S. 1(1972), but to implement COINTELPRO. Although the Court struck the plaintiffs' pendent state law claims for invasion of privacy, the use of informants in this case impinged on the plaintiffs' freedom of association, a crucial element of the First Amendment. NAACP v Alabama, 357 U.S. 449(1958).

And the freedom to associate for the "common advancement of political beliefs" Kusper v Pontikes, 414 U.S. 51,57, necessarily presupposes the freedom to identify the people who comprise the association, and to limit the association to those people only.

Democratic Party of the U.S.A. v LaFollette, 450 U.S. 107(1981).

The above list of injuries were both intended and foreseen by the defendants. In addition they are liable for the perhaps unintended but nonetheless foreseeable mental distress suffered by the plaintiff as a result of the interference with their First Amendment rights.

Perhaps the most serious injury common to all plaintiffs, however, is the loss of trust the defendants' actions have caused--loss of trust in one's government and in the motives of new people who appear at political meetings and gatherings. At least two plaintiffs mentioned that the discovery that there had been informants in their midst caused them to "look differently" at new people now. (Tr.____, Bloom, Waskow). The jury could infer that all plaintiffs have suffered to some extent from the disquieting knowledge that people who pretended to have a genuine interest in their activities were actually paid informants.

B. Summary of Injuries Unique to Certain Plaintiffs

1. Disruption at ECTC demonstration at Three Sisters Bridge site in Georgetown. (Nov. 1969, Tr. _____, Booker, Abbott). Plaintiffs affected: BOOKER and ABBOTT.
2. Intimidating physical surveillance and/or interviews:
 - a.) POLLOCK (Tr. _____, Pollock; three incidents: trailing car late at night; unemployment line interview; and repeated encounters in front of residence.)
 - b.) BOOKER (Tr. _____, Booker; Exhibit 97; astronaut assassination interview.)
 - c.) ABBOTT (Tr. _____, Abbott; encounters with SA Phil Wilson.)
3. Interference with family, employer or neighborhood relations:
 - a.) HOBSON (family strain, employer contacted; Tr. _____ Hobson, Exhibit 95)
 - b.) BOOKER (wife frightened; employers contacted, resignation suggested; Tr. _____, Booker; Exhibit 97)
 - c.) WASKOW (family and neighborhood relations stifled; Tr. _____, Waskow.)
4. Lost employment opportunities: BLOOM (Tr. _____ Bloom; Exhibit 96) (No further government contracts to firm after FBI spoke to clients.)
5. Interference with Black United Front activities: attempts to discredit Julius Hobson, BUF leader; (Exhibits 20,21); "drug dealers" letter, Tr. _____, Eaton, Booker. Plaintiffs affected: BOOKER and EATON.
6. Interference in internal affairs of church: EATON (Exhibit 98-1)
7. Interference with Poor Peoples Campaign by dissemination of false press releases: EATON (Exhibits 10,11,12)

PART ONE

THE FBI'S COUNTERINTELLIGENCE PROGRAMS: COINTELPRO-NEW LEFT and COINTELPRO-BLACK NATIONALIST

The evidence concerning specific plaintiffs was received against the backdrop of the evidence concerning general nationwide FBI practices and the city wide practices of the D.C. Police Department in the 1964-1974 period. The jury could have found the following facts about the political intelligence practices of both agencies.

1. Both the FBI and the DC Police Department had distinct organizational units whose functions were to gather information and create dossiers on the political activities and beliefs of ordinary American citizens who were neither engaged nor suspected of being engaged in any criminal activity. (Tr.____, Brennan, Jones, Wilson, Herlihy, Exhibits 72,109). In the case of the FBI, this domestic political intelligence function existed at both the national headquarters and the field level which in this case for most purposes was the Washington Field Office (WFO). Id.

2. Persons were chosen for FBI or DC police surveillance on the basis of their political attitudes and/or perceived association with persons or groups already under surveillance. In the Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (the Church Committee), Senate investigators found:

The Black Nationalist program, according to its supervisor, included "a great number of organizations that you might not today characterize as black nationalist but which were in fact primarily black." Indeed the nonviolent Southern Christian Leadership Conference was labeled as a Black Nationalist "Hate Group." Nor could anyone at the Bureau even define "New Left", except as "more or less an attitude."

Furthermore, the actual targets were chosen from a far broader group than the names of the programs would imply.
(Exhibit 4)

3. The defendants' interest in political activities was not limited to simple intelligence gathering but extended to interfering with the political activities of persons and groups of whom the defendants disapproved. These programs of interference were known as "counterintelligence" programs and are referred to by a sort of acronym which indicated the target of the program: eg. COINTELPRO-NEW LEFT and COINTELPRO-BLACK NATIONALIST, HATE-GROUP are the two counterintelligence programs which figured in this case.

4. The defendants gathered information on the plaintiffs - - their beliefs, goals, plans, and the identities of their friends and supporters - - through domestic intelligence investigations and this information was used to implement the defendants' disruption programs. (Exhibits 4,5,6,9,96-38, 96-45,96-46,96-47,96-58,96-61 as egs.)

5. The vast majority of the information in the plaintiffs' FBI files was obtained through the use of informants who attended plaintiffs' meetings and activities. (Exhibits 95-103).

6. These informants did not limit themselves to collecting information publicly available but also acquired private papers, mailing lists, names of contributors, private conversations, information on personal finances and other matter not intended by the plaintiffs for distribution. (Exhibits 95-103, 88, 90, and 91).

7. In order to gather as much information as possible and to implement COINTELPRO efforts, defendants' informants ingratiated themselves into positions of trust and responsibility in the plaintiffs' organizations. (Tr. ____, Jagen (re: WAPAC); Booker and Bynum (re: ECTC); Exhibits 88, 90, 91 (re: New Mobe, Washington Peace Center); Tr. ____, Bloom (re: New Mobe and WAPAC).

COINTELPRO-BLACK NATIONALIST, HATE GROUPS

8. On August 25, 1967 23 FBI field offices, including Washington D.C., were instructed to initiate a counterintelligence program against black "nationalist" groups and to assign to it "an experienced and imaginative Special Agent." (Exhibit 1) The memo from the Director to the field offices read in pertinent part:

The purpose of this new counterintelligence endeavor is to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder... . No opportunity should be missed to exploit through counterintelligence techniques the organizational and personal conflicts of the leaderships of the groups and where possible an effort should be made to capitalize upon existing conflicts between competing black nationalist organizations. When an opportunity is apparent to disrupt or neutralize black nationalist, hate-type organizations through the cooperation of established local news media contacts or through such contact with sources available to the Seat of Government, in every instance careful attention must be given to the proposal to insure the targeted group is disrupted, ridiculed, or discredited through the publicity and not merely publicized.

The FBI did not define "Black Nationalist, hate-type groups," leaving that to the discretion of each field offices's "imaginative Special Agent."



(Exhibit 1). A follow-up memo from defendant George C. Moore dated February 29, 1968 expanded COINTELPRO-BLACK NATIONALIST to all 41 field offices effective March 4, 1968. (Exhibit 2).

9. The goal of this COINTELPRO was to prevent blacks from forming political coalitions and associations. Exhibit 2 outlined the goals in the following language:

1. To prevent the coalition of militant black nationalist groups. In unity there is strength; a truism that is no less valid for all its triteness. An effective coalition of black nationalist groups might be the first step toward a real "Mau Mau" in America, the beginning of a true black revolution.

2. Prevent the rise of a "messiah" who could unify, and electrify, the militant black nationalist movement. Malcolm X might have been such a "Messiah"; he is the martyr of the movement today. Martin Luther King, Stokely Carmichael and Elijah Muhammed all aspire to this position... .

3. Prevent violence on the part of black nationalist groups. This is a primary importance Through counterintelligence it should be possible to pinpoint potential troublemakers and neutralize them before they exercise their potential for violence.

4. Prevent militant black nationalist groups and leaders from gaining respectability, by discrediting them to three separate segments of the community ... to, first, the responsible Negro community. Second, ... to the white community, both the responsible community and to "liberals" ...[and] third, ... in the eyes of Negro radicals

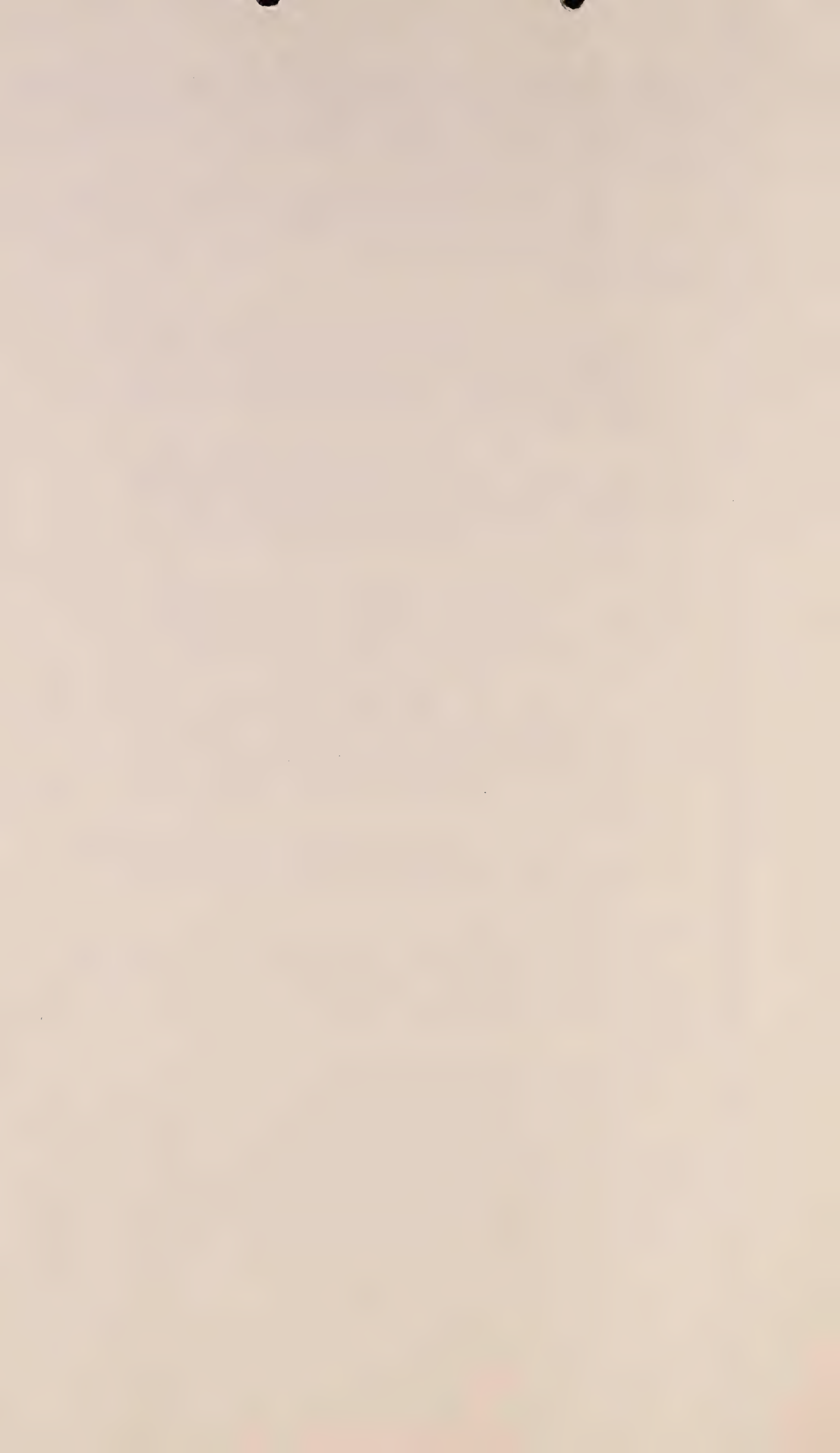
5. A final goal should be to prevent the long range growth of militant black nationalist organizations especially among youth.

(All emphasis in original).

Among the counterintelligence techniques used by the defendants in implementing COINTELPRO-BLACK NATIONALIST in Washington, D.C. were the following.

(a) Use of fictitious press releases

(1) Just before Martin Luther King's planned "Poor People's March on Washington", the FBI prepared several unattributed press releases implying 1) that King was corrupt and was soliciting money he did not need; 2) had in his entourage an "unstable element with a real potential for



violence"; and 3) that the campaign leaders rode around in cars while the poor people slogged through the mud. (Exhibits 10, 11, and 12). These proposed "press releases" were prepared by defendant Moore; the notation "handled" on one indicates the ersatz press release was sent out to a "friendly" newsperson. (Mostrom testimony; Exhibit 10).

The avowed purpose of these anonymous press releases was not to inform the public but "to curtail success of Martin Luther King's fund raising for the Washington Spring Project" [later called the Poor People's Campaign], (Exhibit 10), and in general to "discredit" King and his followers as the original COINTELPRO directive (Exhibit 1 and 2) had ordered.

Notations on Exhibits 10, 11, and 12 indicated the releases were sent to the Crime Records Division of the FBI. The Church Committee report explained what the Crime Records Division's role was in the distribution of press releases.

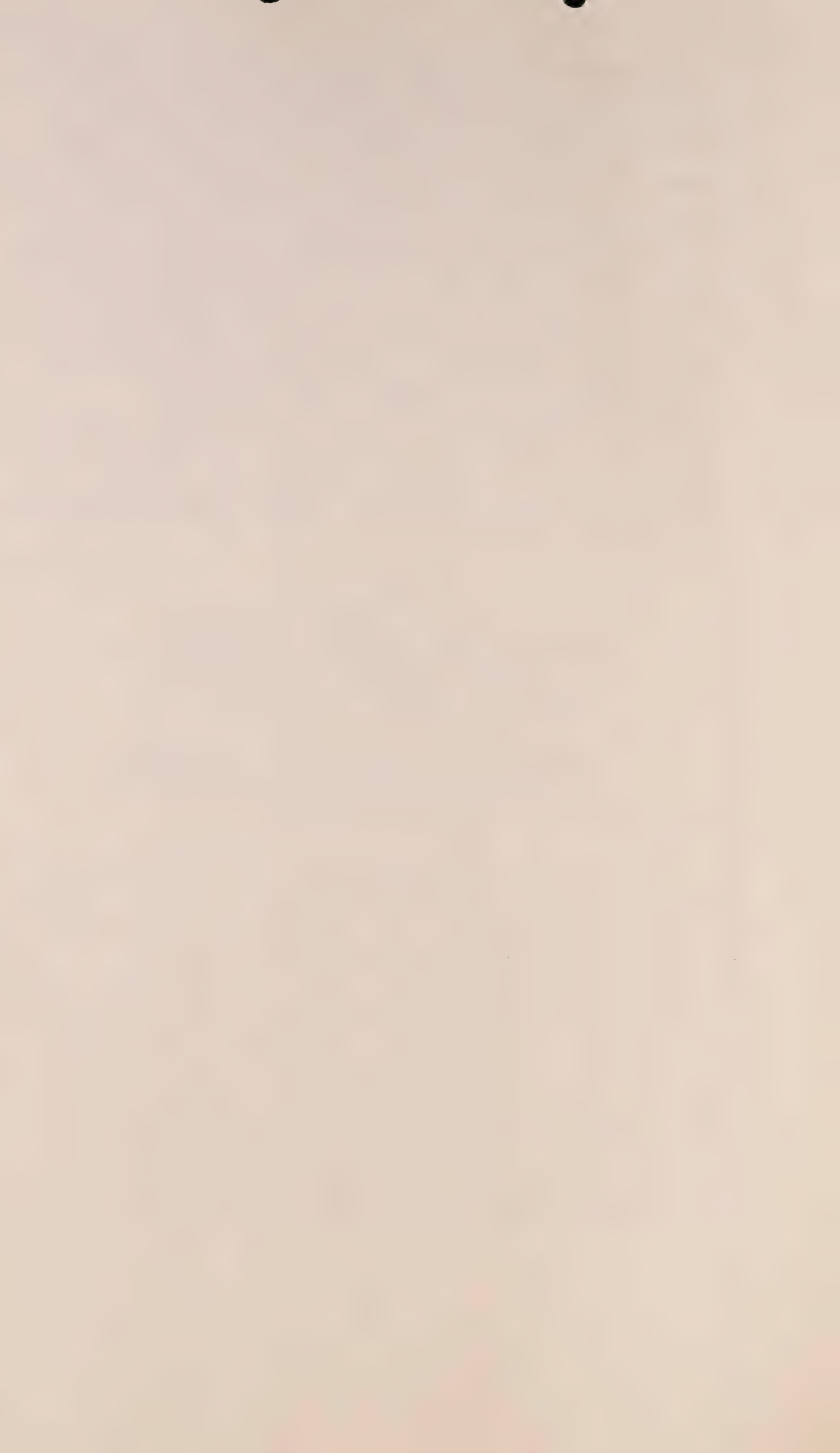
"Friendly" Media

Much of the Bureau's propaganda efforts involved giving information or articles to "friendly" media sources who could be relied upon not to reveal the Bureau's interests. The Crime Records Division of the Bureau was responsible for public relations, including all contact with the media.

The Bureau's use of the news media took two different forms: placing unfavorable articles and documentaries about targeted groups, and leaking derogatory information intended to discredit individuals.

(Exhibit 4)

(2) The late Julius Hobson, husband of plaintiff Tina Hobson, was also the object of a series of FBI authored press releases "calculated to tarnish the image of Julius Hobson and create internal dissention within the ranks of the BUF" (Black United Front). (Exhibit 20; Tr. ____, Harry Ervin). One proposed press release falsely portrays a member of the Black United Front calling Hobson an "Uncle Tom" who has sold out to white intellectuals and white radicals. Another in which a member of the BUF is supposed to have expressed shock at Hobson's support of a peace demonstration was designed "to cause Black leaders to view each other with suspicion and could possibly result in Julius Hobson resigning from BUF". (FBI memo dated 10/1/69, Exhibit 21-1).



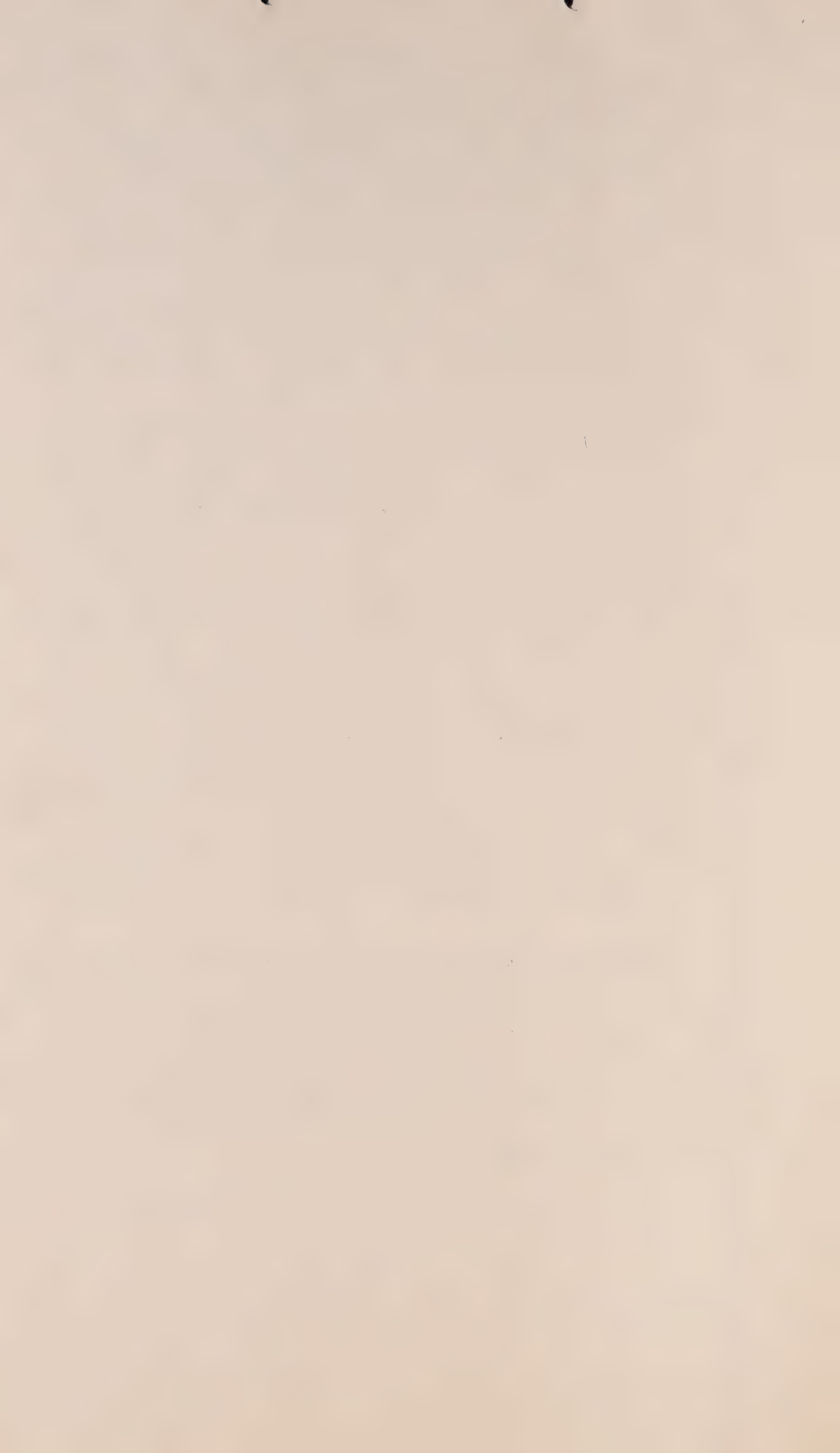
These same releases were also touted by their authors as capable of creating dissension within the Black United Front. (Exhibit 21-1).

(b) Use of fictitious letters (The Give Them Bananas! Letters)

Among the FBI's more "imaginative" COINTELPRO efforts is the correspondence it fabricated between Rev. Douglas Moore of the Black United Front and Abe Bloom, a white peace activist and plaintiff. Exhibit 17 purports to be a personal letter to Abe Bloom from "Rev. Moore" demanding, on behalf of the Black United Front, that Bloom's New Mobilization Committee to End the War in Vietnam pay the Front \$25,000.00, "first payment to be made within 10 days of the receipt of this letter". Id.

Although Abe Bloom testified to receiving this upsetting demand, (Tr. ____, Bloom), Rev. Douglas Moore also testified and denied being the author. Rev. Moore admitted he was the sponsor of a related proposal, made after the April, 1968 civil disturbances in Washington, D.C., that white groups, including major tourist groups, contribute financially to rebuilding the city, but he never made a demand for \$25,000.00 from the New Mobe and never saw the letter that is Exhibit 17 until shown it a short time before he testified at trial. The evidence showed that the first time there was any talk of the New Mobe contributing money to black groups was at a meeting Sammie Abbott set up sometime in August, 1969 between New Mobe members including Bloom and some local blacks including Rev. Moore. At this meeting, according to Abbott, a proposal was made to solicit a contribution of a \$1.00 a person from demonstrators but the proposal was not in writing. (Tr. ____, Abbott).

Plaintiff Bloom could not remember exactly when he received the letter but it was sometime after this August meeting and prior to November 15, 1969. (Tr. ____, Bloom). The evidence was clear that the FBI was aware by mid-August of the idea of collecting money from demonstrators and was anxious to exploit it. In a FBI memo dated August 21, 1969, the \$25,000.00 demand is discussed in these terms:



The Washington Field Office has recommended and the Bureau concurs in that recommendation that this is an ideal situation to exploit through the Counterintelligence Program.

Recipient offices ... are to furnish recommendations for such action to the Bureau by 8/29/69 without fail. Consideration should be given to utilizing informants in both racial and nonracial protest groups in this matter. It is noted that the nonracial protest groups, particularly the N.M.C., can be accused of racism in refusing to go along with this demand. At the same time, such groups could be split further by some individuals calling the Front's demands extortion while other individuals in the group support the demands.

(Exhibit 18). Rev. Eaton testified that the idea of soliciting money from peace marchers was raised at a Black United Front meeting but it was voted down. No Front member could make such a demand without the knowledge and concurrence of all steering committee members, according to Eaton. (Tr. ____, Eaton). Thus the jury could have found that the defendants sent the letter, escalating Rev. Moore's \$1.00 a head suggestion into a \$25,000. demand and thereby creating a conflict where none existed between the New Mobe and the Black United Front.

Not content with the anger and dissension the demand for \$25,000. generated, the FBI fanned the flames it hoped were burning by writing and mailing a slanderous and obscene leaflet purporting to be a reply to the demand from a peace activist named Sid. The leaflet, Exhibit 23, was titled "Give them Bananas!" and depicted a crudely drawn black monkey holding a banana. The leaflet, in an obscene sort of slang that the FBI imagined a peace activist might use, attacks Rev. Moore, calling him a "black blackmailer" . . . whose brain is as sharp as a limp dishrag. Id. The BUF is characterized as "his pack or herd or pride or whatever you call a group of bloodsucking animals"; the leaflet closes with "suck on your bananas, brother and someday you might learn how to make fire or build a wheel. Affectionately, Sid."

Headquarters approval to mail this document was given in a memo dated 10/15/69, initialled by defendant Charles Brennan. (Exhibit 24). In that memo, a note states: "We have been trying to creat a split between these two



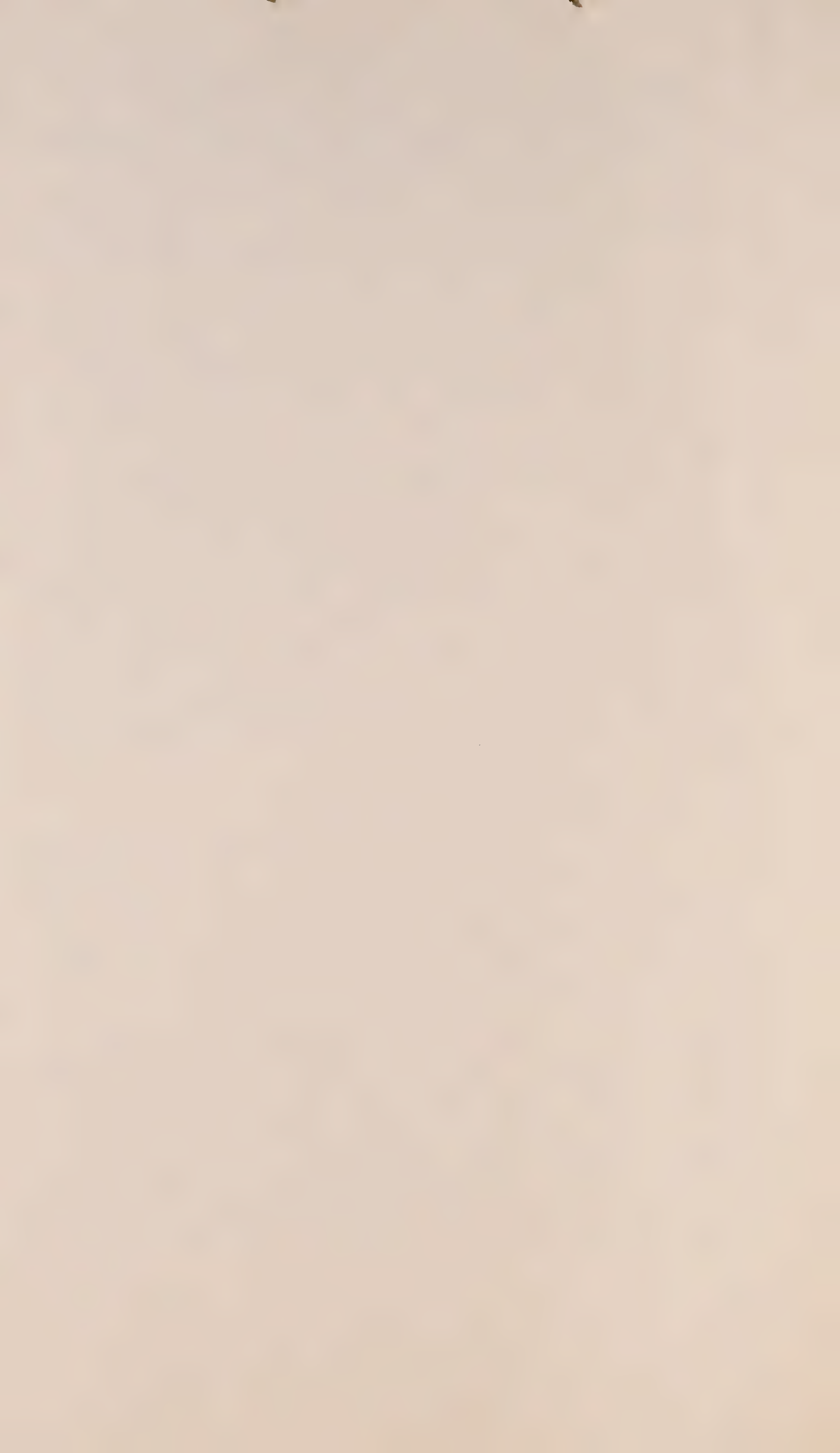
groups based upon this demand. This leaflet may serve such a purpose." Id.

The only individual active in the New Mobe in Washington, D.C. who had been involved in the August meeting whose first name was Sid or Syd was Dr. Sydney Peck, a sociology professor. He testified at the trial and indicated that he would have been the "Sid" the F.B.I. hoped B.U.F. members would believe had signed the leaflet. He did not know of the leaflet until shortly before trial and, of course, did not write it.

Exhibit 25, FBI memo dated 10/24/69, shows the leaflet was mailed in "50 unmarked white envelopes" and that the mailing "should be completed well in advance of the 11/15/69 date." November 15, 1969 was the date of a major anti-war demonstration sponsored by the New Mobe at which Mobe organizers hoped to have a substantial presence of black persons and community leaders. (Tr.____, Tina Hobson, Abe Bloom) Testimony from a number of witnesses established that indeed the leaflet was mailed and received by a number of blacks, especially those active in the Black United Front and that those who received it became angry or upset or disgusted. The testimony also established that the demand for \$25,000.00 had generated a great deal of debate and emotional discussion within the New Mobe and that meetings were held both in Washington, D.C. and in Philadelphia to discuss it. (Tr.____, Waskow; Gurewitz; Bloom, Hobson).

(c) Fictitious letter from "drug dealers"

In a suspiciously similar fashion, an anonymous letter purporting to be from Washington, D.C.'s drug dealers was sent to all members of the Black United Front's steering committee threatening their lives if they did not stop their campaign against drug use, - - the lives of all B.U.F. members, that is, except for Rev. David Eaton who was unexplicably singled out for survival. (Tr.____, Eaton). The following evidence support a conclusion that the anonymous "drug dealers" letter also came from the FBI: 1) the FBI had multiple informants within BUF who attended steering committee meetings. (Exhibit 97 and 98, FBI file excerpts from Eaton and Booker); 2) the drug situation was discussed at BUF meetings and these discussions are reported in FBI informant reports; (Exhibit 97-22 for eg.) 3) one of the



purposes of COINTELPRO-BLACK NATIONALIST was to "disrupt" groups and "discredit" their leaders; Eaton was a leader of BUF and by singling him out in the letter, the FBI could have hoped to cast suspicion on him; and 4) the letters, all identical and all typed, were mailed to the BUF members at their homes, just as the "bananas" leaflet had been.

(d) Intimidating interviews

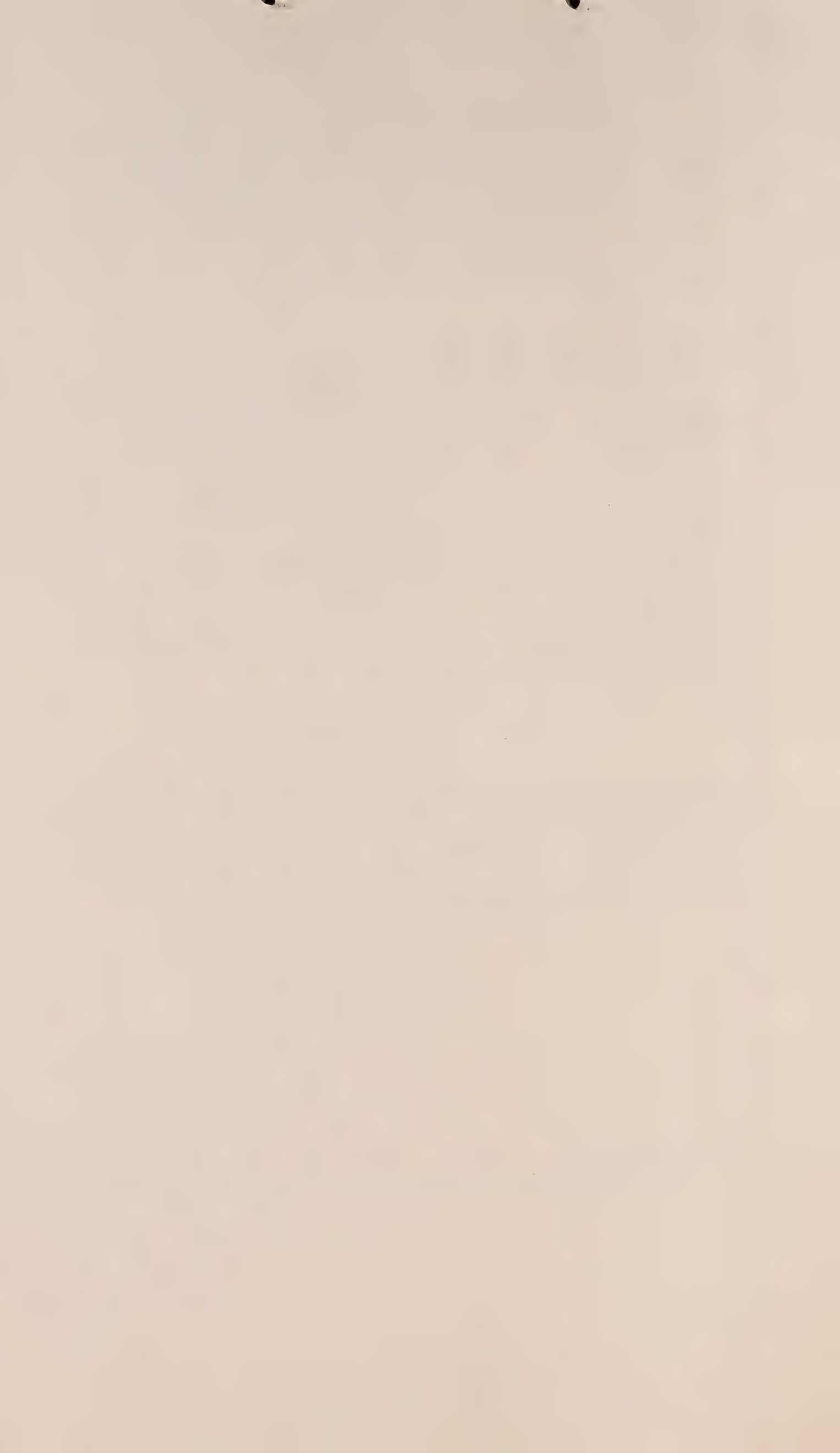
Intimidating interviews by FBI agents were conducted ostensibly to gather political information but in internal documents the FBI acknowledged the interviews also had the purpose of intimidating the interviewee from the free exercise of his First Amendment rights and discourage others from associating with him. (Exhibits 69 and 70). Although exhibits 69 and 70 are FBI memos describing extensive interviewing of New Left subjects, the testimony in this case and the Church Committee both confirm that the technique was used in the Black Nationalist program as well. (Tr. _____, Booker; Exhibit 97 and 4).

COINTELPRO-BLACK NATIONALIST remained in effect until April 28, 1971 when all COINTELPROs were officially discontinued unless there were "exceptional instances" where it would be considered "with tight procedures to insure absolute security." (Exhibit 36).

* * *

COINTELPRO-NEW LEFT

10. On May 9, 1968 defendant Brennan in a memo to his superior



proposed a new FBI counterintelligence program, COINTELPRO-NEW LEFT.

(Exhibit 3). The purpose of this program was "to neutralize the New Left and the Key Activists. ... to expose, disrupt and otherwise neutralize the activities of this group and persons connected with it." Id. In a memo about the program to all field offices dated 5/10/68 the Bureau instructed its offices:

We must frustrate every effort of these groups and individuals to consolidate their forces or to recruit new or youthful adherents. In every instance, consideration should be given to disrupting the organized activity of these groups and no opportunity should be missed to capitalize upon organizational and personal conflicts of their leadership.

(Exhibit 3)

11. The terms "these groups" and "New Left" were undefined. In trial testimony defendant Brennan acknowledged that the New Left included anyone opposed to the Vietnam War and the Church Committee found that no one from the Bureau could define "New Left" except as "more or less an attitude."

(Exhibit 4, p.2). The targets for the New Left program "were chosen from a far broader group than the names of the program would imply." (Exhibit 4) Virtually every anti-war group was targeted. Id. Trial testimony showed that even purely local community groups such as the Emergency Committee on the Transportation Crises (E.C.T.C.) were objects of extensive FBI surveillance. (Tr. ____, Abbott; Exhibit 95).

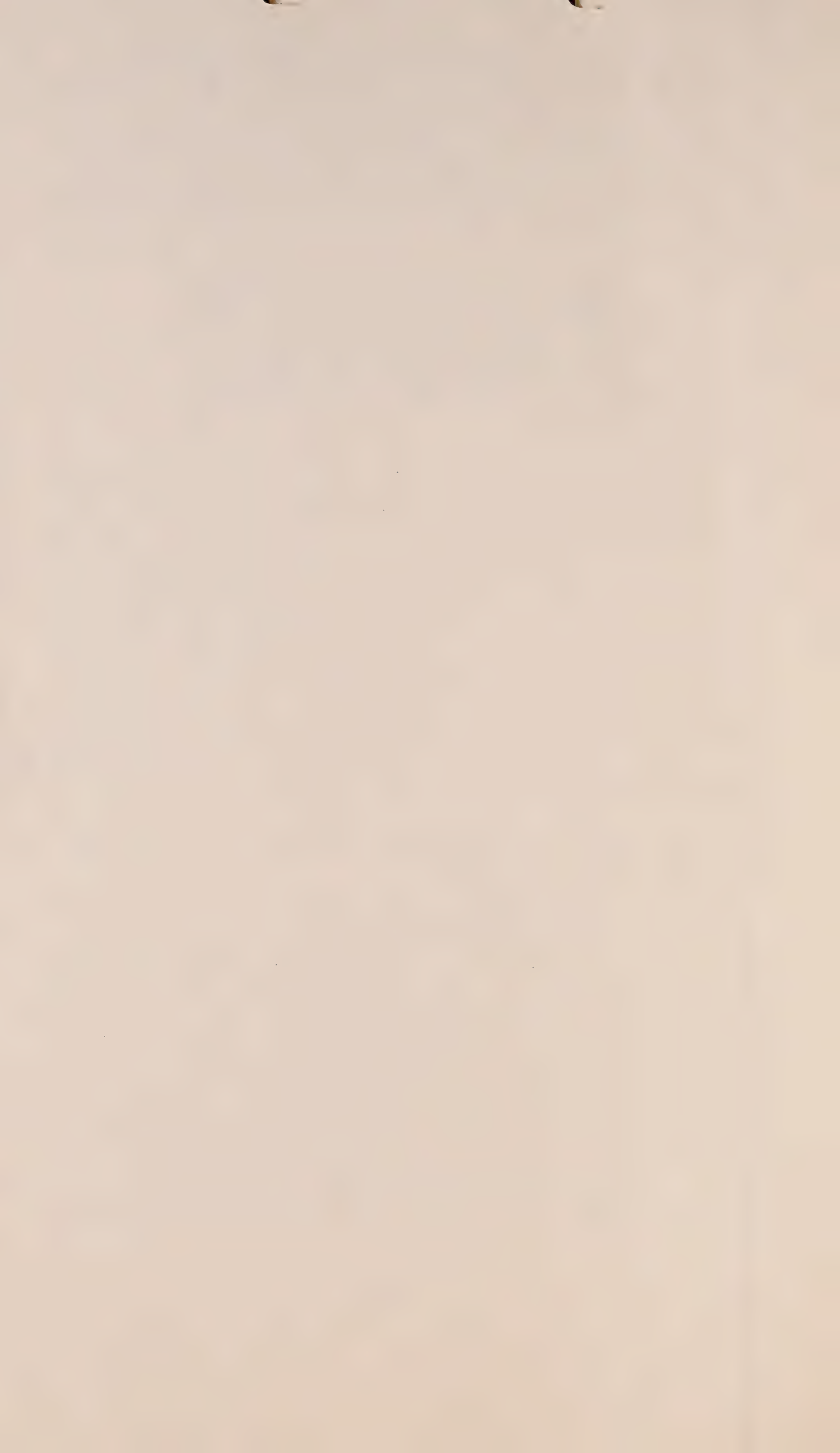
12. Among the counterintelligence techniques used in implementing COINTELPRO-NEW LEFT were the following:

(a) Interference at demonstrations (FBI "peace marshalls")

Exhibits 15 and 16 show the FBI intercepted radio conversations of the peace marshalls at a demonstration January 20, 1969 and, pretending to be marshalls, gave countermanding orders thereby misdirecting crowds. The march interfered with was one for which a permit had been obtained and a planned parade route reviewed by local officials. (Tr. ____, Bloom; Wilson). It took place the day before the 1969 Inauguration of President Nixon.

(b) Interference at demonstrations (FBI's housing forms)

Exhibits 13 and 14 show that using their informants within



various peace groups, the defendants obtained a copy of a form to be filled out by persons willing to provide overnight accommodations to out-of-town visitors coming to Washington, D.C. for the counter-inaugural protests. By filling out these forms with fictitious names and addresses and returning them to the offices of the protest organizers, the FBI hoped to create "confusion among the demonstrators as many of them made useless trips to locate nonexistent addresses." (Exhibit 14). Based on the testimony of Victor Kaufman from the Washington Peace Center, who testified to receiving calls through the evening from stranded demonstrators, the jury could have found this program to have been a success, in FBI terms.

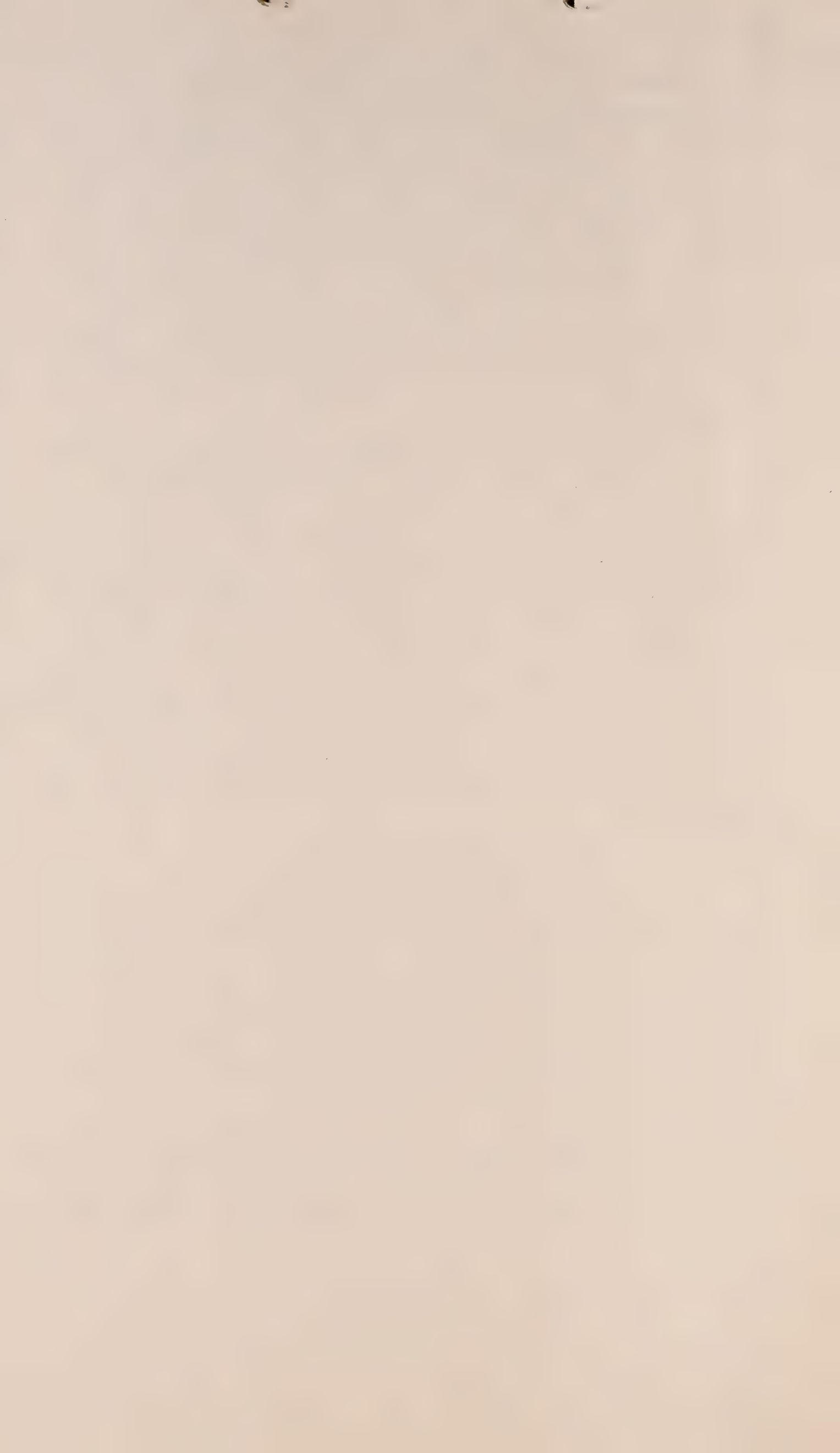
(c) Interference at demonstrations (disruption of travel plans)

Exhibit 105 shows that FBI efforts were not confined to interfering with demonstrations in progress but included efforts to keep people away. In December, 1968 the Cincinnati office received approval from headquarters to call bus companies anonymously and cancel buses scheduled to take students from Ohio universities to Washington, D.C. for the counter-inaugural. It also received approval to make fake calls to student organizers telling them the buses had been cancelled. The jury could easily have found, in light of the purposes of COINTELPRO-NEW LEFT, that such tactics were used in connection with every major public anti-war demonstration held in Washington, D.C.

(d) Efforts to create internal turmoil

Efforts to create internal turmoil and dissension with anti-war groups were carried out by sending anonymous letters, leaflets and other mailings to persons the FBI hoped to incite to anger. The "Bananas" leaflet and letter from Rev. Moore, both of which the jury could have concluded were authored by the FBI, have been discussed supra. (Exhibits 23-25). In addition, the New York Times article was aimed at New Left figures as well as blacks. (Exhibit 7).

Through its informants, the FBI was able to identify which peace activists belonged to particular minority parties on the left and then used



this information to write anonymous leaflets which the jury could have found were intended to set one faction against another and thereby divert the groups as a whole from their common peaceful purpose of opposing the war.

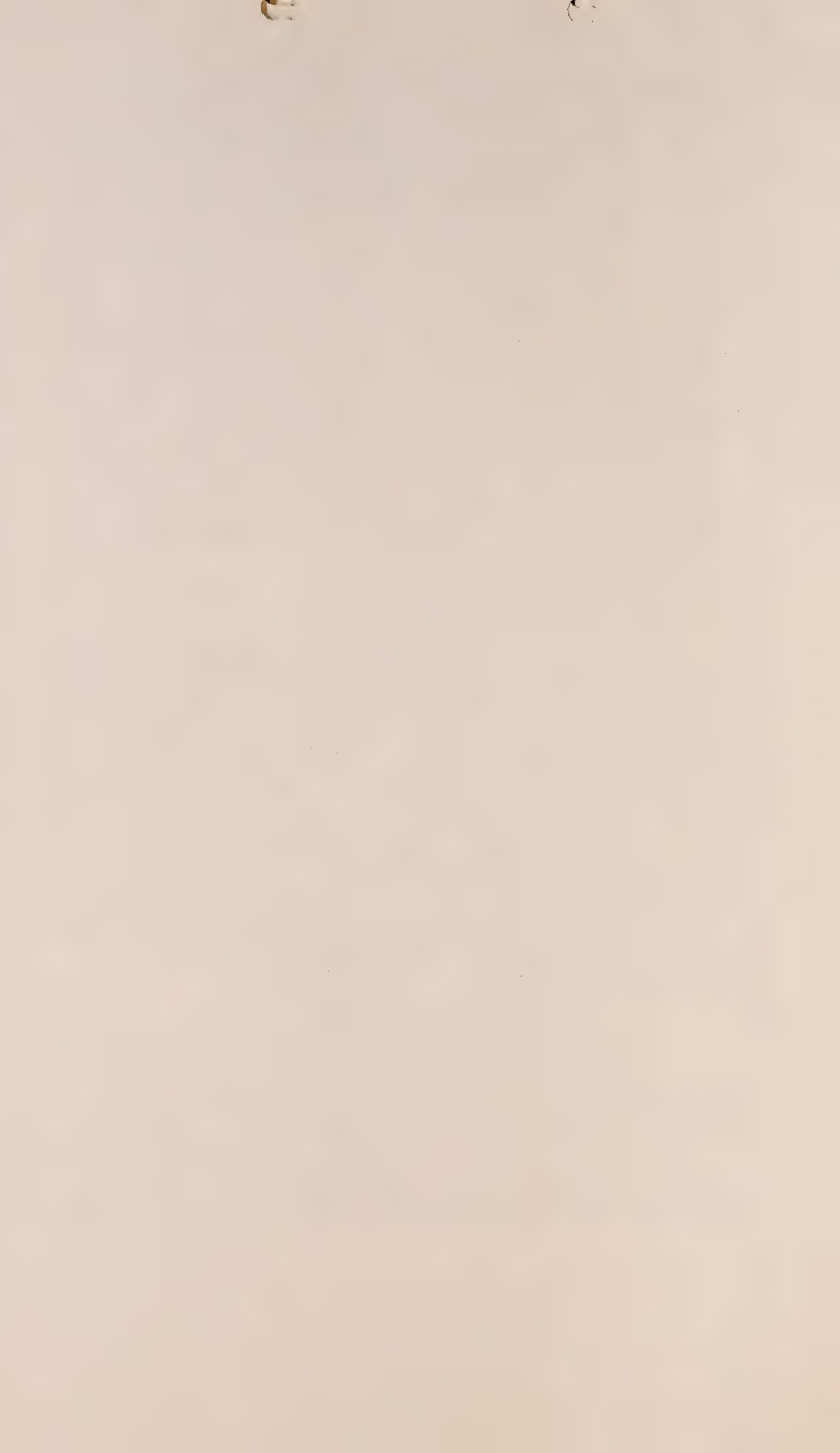
(Exhibit 31: FBI memo dated 2/3/70 enclosing a suggested memorandum from an alleged disgruntled black New Mobe member "... which is designed to cause splits within N.M.C. leadership ..." .) Similar in its obscene tone to the "Bananas" leaflet is one titled "Fly United?" sent by the FBI "to cause disruption in the peace movement" by setting the Socialist Workers Party members (who the leaflet attacks) off against the others in the New Mobe. (Exhibit 31A). Tina Hobson testified to being told by someone that she should not speak at a certain demonstration because the SWP or some other group on the left was involved and they were too radical. This testimony sustains an inference that the defendants' efforts at creating suspicion among peace groups succeeded in some measure.

(e) The Rational Observer

In order to discourage students from participating in the anti-war movement, the FBI authored a "student" newspaper which it distributed at American University. Called "The Rational Observer", the paper warned students against joining in the peace effort as something "which could cause you embarrassment tomorrow". (Exhibit 27). Although defendant Grimaldi, who wrote the paper, testified he was just trying to educate students, the jury could have found that the purpose of the paper, admittedly a COINTELPRO-NEW LEFT project, was to discourage student participation in anti-war activities and that it did so. The paper was distributed on campus during the Fall and Winter 1969-1970, (Tr.____, Rich Pollock).

(f) Extensive physical surveillance

Extensive physical surveillance and public interviewing of New Left targets was carried out both to gain information and to cool the enthusiasm of persons interviewed from being politically active. Rich Pollock testified to being trailed late at night by an automobile that followed his car from just outside an anti-war group's offices far out into the country-



side; the evidence sustained an inference that the defendants or their agents were responsible. In addition Pollock testified to being loudly and publicly interviewed by FBI agents as he stood in a line of people waiting to apply for unemployment benefits. (Tr.____,Pollock). He was also spoken to by name by individuals in plain clothes who sat in cars with police radios parked outside his residence. (Tr.____,Pollock). FBI memoranda confirm that the FBI was well aware of the in terrorem effect of direct physical surveillance and questioning. (Exhibits 6,70, and 69).

COINTELPRO-NEW LEFT was officially discontinued on April 28, 1971. (Exhibit 36).

PART TWO

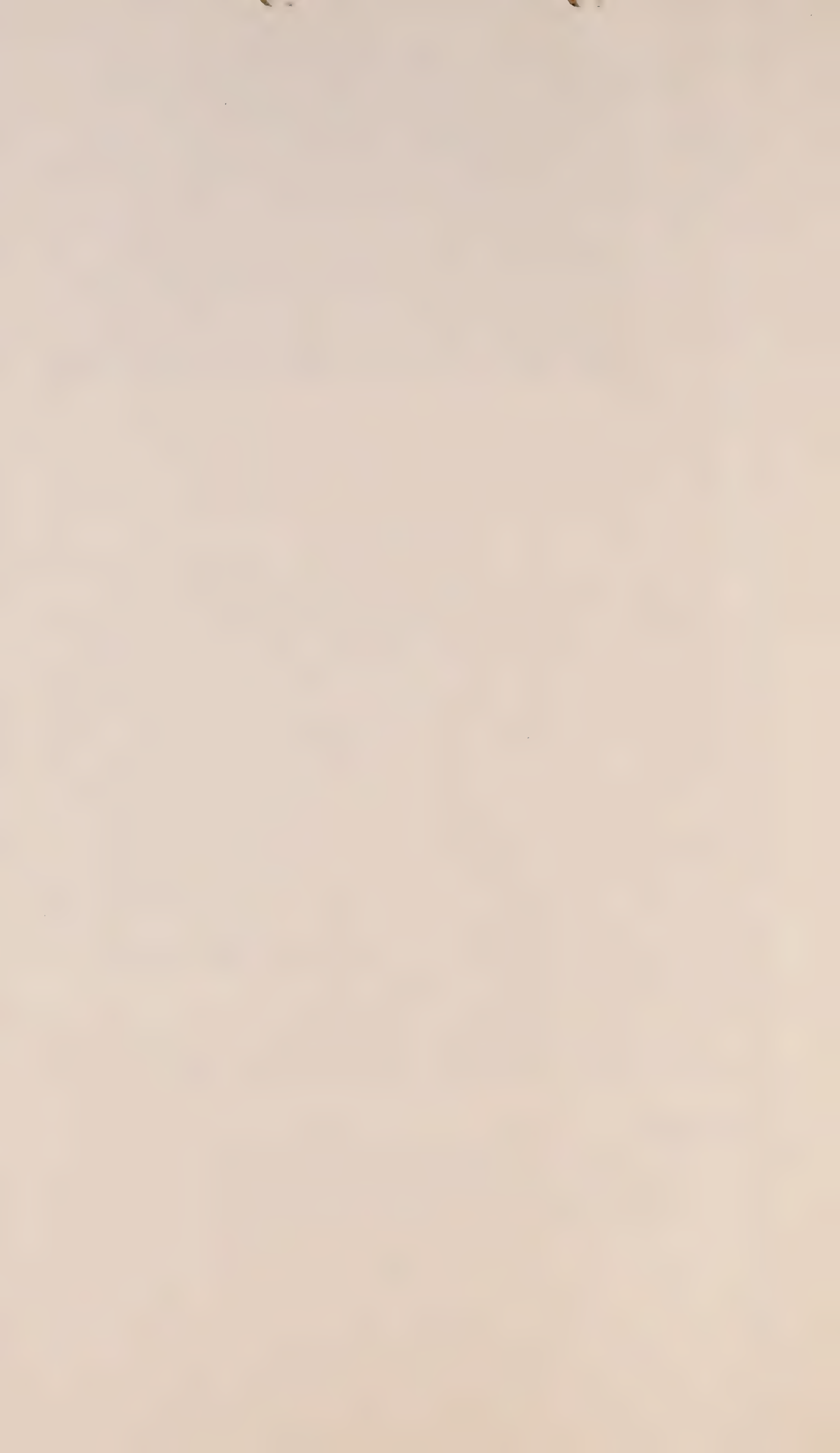
In determining to what extent the plaintiffs were harmed by the activities described in Part One, the jury could consider in addition to the documents and the plaintiffs' own testimony, the fact that the plaintiffs were identified by the defendants as key targets. Evidence of this is the fact all individual plaintiffs but Tina Hobson were placed on lists, either the Security Index (Exhibit 80) or the Agitator Index, and these lists were used to locate targets for COINTELPRO disruption programs. (Exhibit 4). Furthermore, the fact that six plaintiffs' telephone conversations were intercepted by wiretaps and notes on the conversations kept by the defendants suggests more than just casual interest in the plaintiffs. (Exhibit 45,ELSUR cards on Abbott, Bloom, Booker, Eaton, Pollock, and Waskow; notations of contents of conversations are in exhibits 66-68).

The evidence of the particular harm inflicted on individual plaintiffs is discussed herein in the order in which the plaintiffs appeared at trial.

Tina Hobson

The jury could have found as follows with regard to Tina Hobson:

1. Tina Hobson became a subject of FBI interest as a result of her



friendship with Julius Hobson, a well-known black civil rights activist. The FBI was considering using Mrs. Hobson as a "racial source" or informant on local black community activities, (Exhibit 99-1) but this idea was dropped when the Hobsons announced their engagement in November, 1969. (Exhibit 99-6.)

2. In November, 1969 the FBI contacted Tina Hobson's employer, the Civil Service Commission, and inquired about her record, her background and, apparently, her race. (Exhibit 99-4.). She was at the time director of the Federal Womens' Program at the CSC. Shortly after this contact, the Civil Service Commission conducted a full field investigation up-date on Mrs. Hobson, something unusual unless an employee is under consideration for promotion to a high position. (Tr.____, Hobson), Mrs. Hobson was not under any such consideration as far as she knew. She was not promoted further as a result of FBI inquiries about her to the Civil Service Commission.

3. Tina Hobson's marriage to Julius Hobson is discussed in internal FBI memoranda from the standpoint of the harm this interracial marriage might do to the reputation of Julius Hobson. (Exhibits 99-9, 99-12.).

4. The FBI wished to harm the reputation of Julius Hobson and to discredit him and to this end encouraged publication by local "friendly" news media of unfavorable references to the interracial Hobson marriage. Tina Hobson recalled unfavorable news articles about them being published.

5. Tina Hobson together with her husband was actively involved in the peace movement from at least 1969 through 1974. She either attended or spoke at or gave the support of her name (or all three) to virtually every peace demonstration in Washington, D.C. She organized federal employees against the war. She was a speaker at a demonstration at the U.S. Capitol in May, 1972 which was disrupted by one of defendants' agents provocateur.

6. At a time when many black community leaders were concentrating on local or racial issues Julius Hobson supported the peace movement, a position which set him apart from most other black community leaders. Tina Hobson shared her husband's goal of obtaining the active participation of blacks as well as whites in peace marches and demonstrations and this was



the specific focus of her participation in the November 15, 1969 march which she helped plan. Due in part to the false letters the FBI had concocted (Exhibits 17-25), the goal of achieving wide spread local black community support for this march was not realized. The schism thus created continued beyond November, 1969. (Tr.____, Hobson).

7. The FBI's efforts created tension between the Hobsons and the Black United Front, thereby isolating the plaintiff politically from persons she would have otherwise associated with. Although the evidence indicates the principal target of the defendants' efforts was Julius Hobson, Tina Hobson was not an "unforseen plaintiff" cf. Palsgraf v Long Island LR. Co., 162 N.E. 99(1928), and she was affected adversely and burdened in her right of political association.

8. Tina Hobson's efforts at First Amendment expression through public protests and demonstrations were diverted in some degree, impossible to measure, and directed instead at healing over personal conflicts and mistrust that had been artificially created by the defendants particularly between her husband and Rev. Douglas Moore. (Exhibits 20,21).

9. As a result of the strain unfavorable public attention to her marriage brought to her home and her consciousness of being under some surveillance, Tina Hobson decided to send her two children from a prior marriage out of town to private school.

Abe Bloom

The jury could have found the following in regard to plaintiff Abe Bloom:

1. That Abe Bloom was active in the peace movement throughout 1964-1974 and was one of the principal organizers of major demonstrations including the March on Washington on November 15, 1969 and the counter-inaugural in January, 1969. He served as chairman of the local peace group known first as the Washington Mobilization Committee then Washington Area Peace Action Coalition (WAPAC). He also was an active leader of the national coalitions, the New Mobilization Committee and National Peace Action Coalition (NPAC).



2. He often took time away from his own business to work on peace activities. Around the time of a major demonstration would often be at meetings almost every night of the week.

3. He was the target of COINTELPRO-NEW LEFT efforts. His name was listed on the Security Index and his FBI file showed FBI informants at virtually every meeting he attended 1964-1974, most of which he chaired. (Exhibit 96).

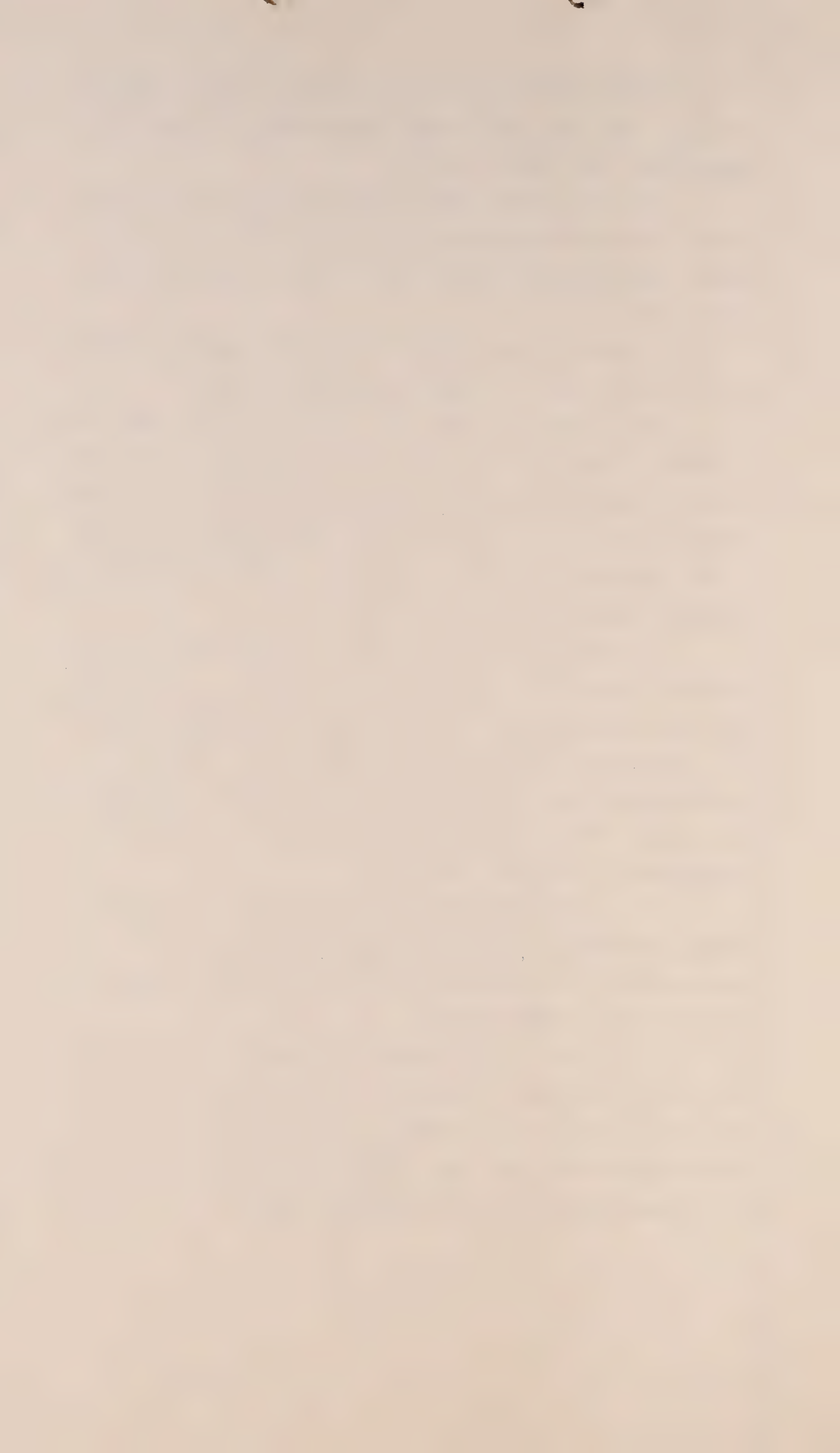
4. His efforts at exercising his First Amendment rights were thwarted or substantially burdened by actions of the defendants, viz.:

(a) the defendants' creation of a false and divisive issue within the New Mobe by sending him the "BUF" \$25,000. demand letter thereby causing plaintiff Bloom to devote time and energy to discussing and debating this matter at a time when he was burdened with preparations for the November 15, 1969 demonstration and diverting him from the productive use of his time to organize a protest against the war. (Exhibit 17).

(b) keeping potential demonstrators away from marches and rallies organized by plaintiff Bloom by cancelling buses (Exhibit 36) for students and others, by giving bus drivers false instructions at demonstrations so that demonstrators did not get picked up after the event was over thus discouraging some from future participation, and by misdirecting demonstrators to nonexistent overnight housing, again with the effect of causing some not to participate in the future. (Exhibit 13).

(c) by interfering with the prearranged plans for demonstrations through countermanding peace marshal crowd directions so that the demonstration was less organized and hence less effective and impressive than it would have been. (Exhibits 15,16).

(d) by diverting plaintiff Bloom's attention and energy and that of his staff the day before the November 15, 1969 demonstration to meeting a financial crisis created by an informant who intentionally wrote a bad check to the telephone company thus putting in jeopardy all the communications for the demonstration. (Tr.____, Bloom, Gurewitz, Peck).



(e) FBI surveillance of plaintiff Bloom extended to FBI interviews of prospective customers of Bloom's engineering firm with the result that after these contacts Bloom's firm received no more government contracts, contracts it had enjoyed prior to FBI contact. (Tr.____,Bloom).

5. Bloom suffered mental distress as a result of the defendants' actions interfering with his First Amendment rights and, in addition, mental distress from a) learning when he reviewed his FBI file that an old and trusted friend had talked with the FBI about him; b) learning that the person to whom he trusted financial contributors' names, mailing lists and other non-public information in WAPAC had been an informant (Ed Jagen) and also that there were informants in the New Mobe. This knowledge has caused plaintiff Bloom to become less trusting of new people in political associations thereby further burdening his exercise of his First Amendment rights. (Tr.____,Bloom).

Richard Pollock

The jury could have found as follows in regard to Richard Pollock:

1. While a student at American University from 1969-1971, Rich Pollock was active in the Student Mobilization Committee, a COINTELPRO-NEW LEFT target (Exhibit 4), and after leaving college remained active in anti-war activities, assuming a central role as a member of the National Student Association and later in the Peoples Coalition for Peace and Justice (PCPJ).

2. While at American University, he was on the staff of the student newspaper, The Eagle, which attempted to inform students about anti-war activities going on in the city. In this effort, he was thwarted to a degree impossible to determine by the FBI's publication at the same time of The Rational Observer, a so-called student newspaper which ridiculed and attacked the various peace groups thereby leaving students who read the paper the impression that their participation in anti-war efforts would be met by ridicule or derision by at least some of their fellow students.

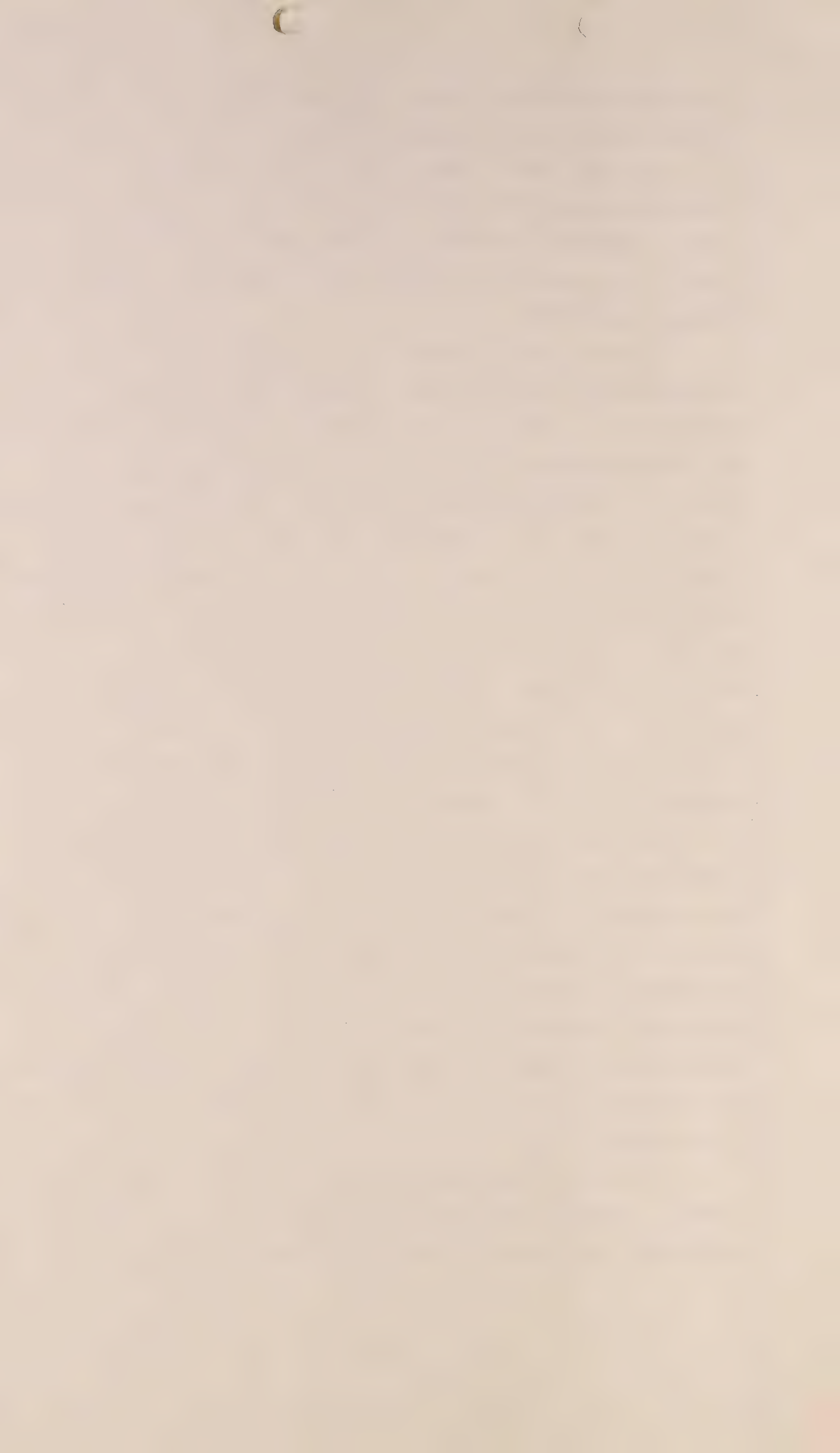
Pollock encouraged students to learn about the war in Vietnam and organized meetings and talks to achieve this. The Rational Observer

discouraged such attendance and had a dampening effect on student involvement in First Amendment activities concerning the war.

3. Plaintiff Pollock attended most if not all the major demonstrations against the war held in Washington, D.C. from 1969-1974. He served as a marshall at demonstrations in the 1969-1970 period and it is likely he was a marshall at the demonstration at which the FBI disrupted marshall communications.

4. Pollock's participation in anti-war activities was made more difficult by the extensive physical surveillance and psychological intimidation he was subject to by the defendants. The defendants intentionally made their surveillance of the plaintiff known to him in an effort to discourage him from political activity. Defendants' agents would park in unmarked police cars outside the plaintiff's residence regularly in 1971-1972 and address the plaintiff by name as he came and went. Defendants either followed or had plaintiff's car followed on one occasion late at night on or about April 20, 1971 causing the plaintiff fear and mental distress. (Tr.____, Pollock). The evidence that connects the defendants with this incident is as follows. Pollock made the arrangements to go out to a friend's house in the country over the telephone at PCPJ offices in 1029 Vermont Ave. N.W. He was picked up by his friend at PCPJ offices and it was shortly after they left 1029 Vermont that they realized they were being followed. Exhibit 67 establishes that the PCPJ telephone was tapped at this time and that Pollock was overheard on it. Pollock also recalled that the trip coincided with a big demonstration because it was his last chance to relax before a major demonstration that coming weekend. (Tr.____, Pollock). Plaintiff was publicly accosted and interviewed by two FBI agents who so identified themselves while he was standing in a line for unemployment compensation in February, 1973 and the same agents insisted on driving him home, causing him to feel anxious and nervous. (Exhibit 100-2).

5. His efforts at expressing his opposition to the Vietnam War through peaceful, organized protests were thwarted by defendants' agents provocateur, notably Anne Kolego, who was a disruptive influence at PCPJ planning.



meetings, who threw tear gas cannisters at the police at a 1972 demonstration of the PCPJ at the U.S. Capitol thereby discrediting the peaceful nature of the gathering and advocated unlawful acts (eg. jumping over White House fence) at other demonstrations. (Tr.____, Collum, Pollock, Hobson). The disruptive presence of Anne Kolego discouraged participation of serious persons in PCPJ's activities and made it more difficult for Pollock to attract and keep new people who might otherwise have associated with him the anti-war activities.

Reginald Booker

The jury could have found as follows in regard to Reginald Booker:

1. That for the 1964-1974 period he was active in the Black United Front, was chairman of ECTC, organized federal employee groups to combat racial discrimination in employment and participated in anti-war activities. The majority of his time was devoted to ECTC and BUF activities.

2. Booker was labeled by the FBI as an "Agitator" (Exhibit 97-27) and was a target for COINTELPRO-BLACK NATIONALIST tactics.

3. He received a copy of Exhibit 23, the "Bananas" leaflet, mailed anonymously to his home and its offensive racial tone caused him anger and acute mental distress. (Tr.____, Booker).

4. He received a death threat letter, also mailed anonymously to his home, signed by "drug dealers" but in fact from FBI agents in an attempt to disrupt the Black United Front of which he was a founding and active member. (Tr.____, Booker).

5. Booker was subject to extensive, intrusive surveillance that included questioning his employees, past and present, his friends, relatives including in-laws, and neighbors with the intended effect of casting suspicion on Booker and creating strain in his personal and employment relations. FBI surveillance contributed to marital strain and caused his employer at G.S.A. to call him in and ask if he wished to resign, all of which caused Booker mental distress and burdened his participation in First Amendment activities. (Exhibit 97-19; Tr.____, Booker).

6. Booker was also subject to an intimidating interview at which FBI agents accused him of participating in a plot to assassinate the Apollo 9 astronauts, a charge the FBI knew was false but which was intended to frighten the plaintiff and which did frighten him. (Exhibit 97-115; Tr.____,Booker).

7. A demonstration at the Three Sisters Bridge site in Georgetown in November, 1969 which Booker helped organize was disrupted and its character as a peaceful demonstration distorted by defendants' agents who provoked the student crowd into a confrontation with the police, thereby discrediting Booker and E.C.T.C. (Exhibit 97 contains transcripts apparently made from defendants' tape recordings of Booker's speeches to college students on October 22, 1969 about the up-coming Three Sisters Bridge demonstration, suggesting interest in and prior knowledge of demonstration by defendants.)

Arthur Waskow

The jury could have found as follows in regard to Arthur Waskow:

1. That from 1964-1974 he worked both professionally and individually for an end to the war in Vietnam and to this end tried to reach through lectures, public mass demonstrations and other means of political speech as many people as possible in order to create an enormous consensus within American society that the war was wrong and should be stopped.

2. He worked as a fellow at the Institute for Policy Studies which was itself a COINTELPRO-NEW LEFT target and was himself placed on the FBI's Security Index. (Exhibit 103-6).

3. Waskow was on the steering committee of the New Mobilization Committee in the summer and fall of 1969 when the defendants' efforts at creating dissension between the New Mobe and the BUF were in full swing. He initially supported the "demand" for \$25,000 and suffered feelings of isolation and mental distress at finding himself at odds with his colleagues in the New Mobe on this issue. He travelled to Philadelphia to argue in support of the demand before the national New Mobe committee and attended many meetings in Washington, D.C. on the issue. This diverted his efforts

and attention from the expression of his opposition to the war and other instances of social injustice. Energy and time was wasted by the plaintiff in addressing a very divisive issue created almost totally by defendants. (Tr.____,Waskow).

4. The defendants' efforts to create mistrust between white peace activists in the New Mobe and black persons particularly in the Black United Front interfered with the plaintiff's efforts to build a bridge between black community leaders and the anti-war leaders.

5. The plaintiff's personal papers, including letters to him and from him, were seized and copied by the defendants without a search warrant in violation of his Fourth Amendment rights as a part of the defendants' efforts to curtail or thwart the plaintiff in his exercise of his First Amendment rights. (Exhibits 103-12,103-13,103-14,103-15,103-16, etc.). The jury could infer that the plaintiff suffered mental distress as a result of having his private papers inspected and copied.

6. The plaintiff's friends and neighbors in the Adams-Morgan community of Washington, D.C. were questioned by FBI agents about their knowledge of the plaintiff and his beliefs with the effect, intended by the defendants, that Waskow was socially isolated and viewed with suspicion by his neighbors. This placed him under mental and emotional stress and made it more difficult for him to engage in First Amendment activities. His awareness of being under some governmental surveillance made him feel personally insecure and unable even in the privacy of his home to fully discuss personal matters. (Tr.____,Waskow).

Washington Peace Center

The jury could have found as follows in regard to the Washington Peace Center:

1. That the Washington Peace Center was in operation throughout the 1964-1974 period as a meeting place and central clearinghouse for anyone or any group engaged in peaceful protest against the war.

2. That the Peace Center was known to the FBI as a pacifist organization associated with the Society of Friends (Quakers) and yet a domestic

intelligence investigation of the Center was carried on by the defendants in which mailing lists were taken from offices, (Exhibit 102-37c), personal bank accounts were inspected to see who contributed to the Center (Exhibits 102-6, 102-10) and informants attended and reported on meetings there. (Exhibit 102). (Also, Tr.____, Okeson statement before Winkleman, et.al.)

3. The Peace Center helped organize most if not all the major demonstrations against the war in the 1964-1974 period, particularly helping with housing accommodations for out-of-town visitors. (Tr.____, Victor Kaufman). It also trained most of the marshalls used at demonstrations (Id.) The defendants' actions interfering with housing for demonstrators (Exhibit 14) and with peace marshalls' radio communications at a demonstration (Exhibits 15 and 16) directly affected the Peace Center by making futile the work that had been done by its members and staff.

Sammie Abbott

The jury could have found as follows with regard to Sammie Abbott:

1. That he was the publicity director and principal organizer of the Emergency Committee on the Transportation Crisis, a biracial city-wide political association opposed to the construction of any more freeways through Washington, D.C. and that he devoted substantial time and energy to this effort to the detriment of his own business. The plaintiff received no salary for his work with ECTC.

2. That the biracial composition of ECTC and a biracial approach to social and political issues in general was an important goal of plaintiff Abbott's. (Tr.____, Abbott).

3. That in furtherance of this goal he agreed to set up a meeting in August, 1969 between local black community leaders whom he knew from ECTC and the predominately white New Mobilization Committee. He set up the meeting which was attended by person or persons unknown who reported back to the FBI that there had been discussion at the meeting of the possibility of visitors to the Nations Capitol making a voluntary contribution of \$1.00 a person to help rebuild the city. The defendants took this idea and

exploited it to cause racial strife and distrust, the exact opposite of Abbott's goal in setting up the meeting. (Exhibit 17-25).

4. Abbott's time and energies were diverted from other First Amendment activities by the issue the defendants had falsely created over the BUF \$25,000 demand; as a result of the defendants' actions he had to attend meetings and work to heal the breach in black-white relations that had occurred or threatened to occur. (Tr. ____, Abbott).

5. Abbott and members of his family were subject to extensive physical and other surveillance including being approached on the street on many occasions by FBI Special Agent Philip Wilson which overt contacts were intended to deter Abbott from being politically active and which contacts caused him anger and mental distress.

6. As part of the defendants' illegal intelligence investigation of him, Abbott's personal checks relating to routine family expense (eg. daughter's tuition at college) were seized for copying by the defendants in violation of his Fourth Amendment rights thereby causing him anger and mental distress. (Exhibits 95-1 through 95-12).

7. A demonstration organized in part by Abbott at the Three Sisters Bridge site in Georgetown in November, 1969 and planned to be a peaceful protest was disrupted by defendants whose agents taunted plaintiff Abbott calling him a "sell-out" and by their urging caused part of the student crowd to march to an area off-limits whereupon they were tear-gassed and arrested by the police thus limiting the effectiveness of that particular demonstration and discouraging others from associating with ECTC activities in the future.

Reverend David Eaton

The jury could have found as follows in regard to David Eaton:

1. That in the period 1964-1974 Reverend David Eaton was active in a wide variety of political and community affairs in Washington, D.C. including: organizational work on the "Poor People's Campaign" in 1968; an original convenor of the Black United Front in 1967; from 1969 through the present, serving as Senior Minister of All Soul's Unitarian Church; member and then



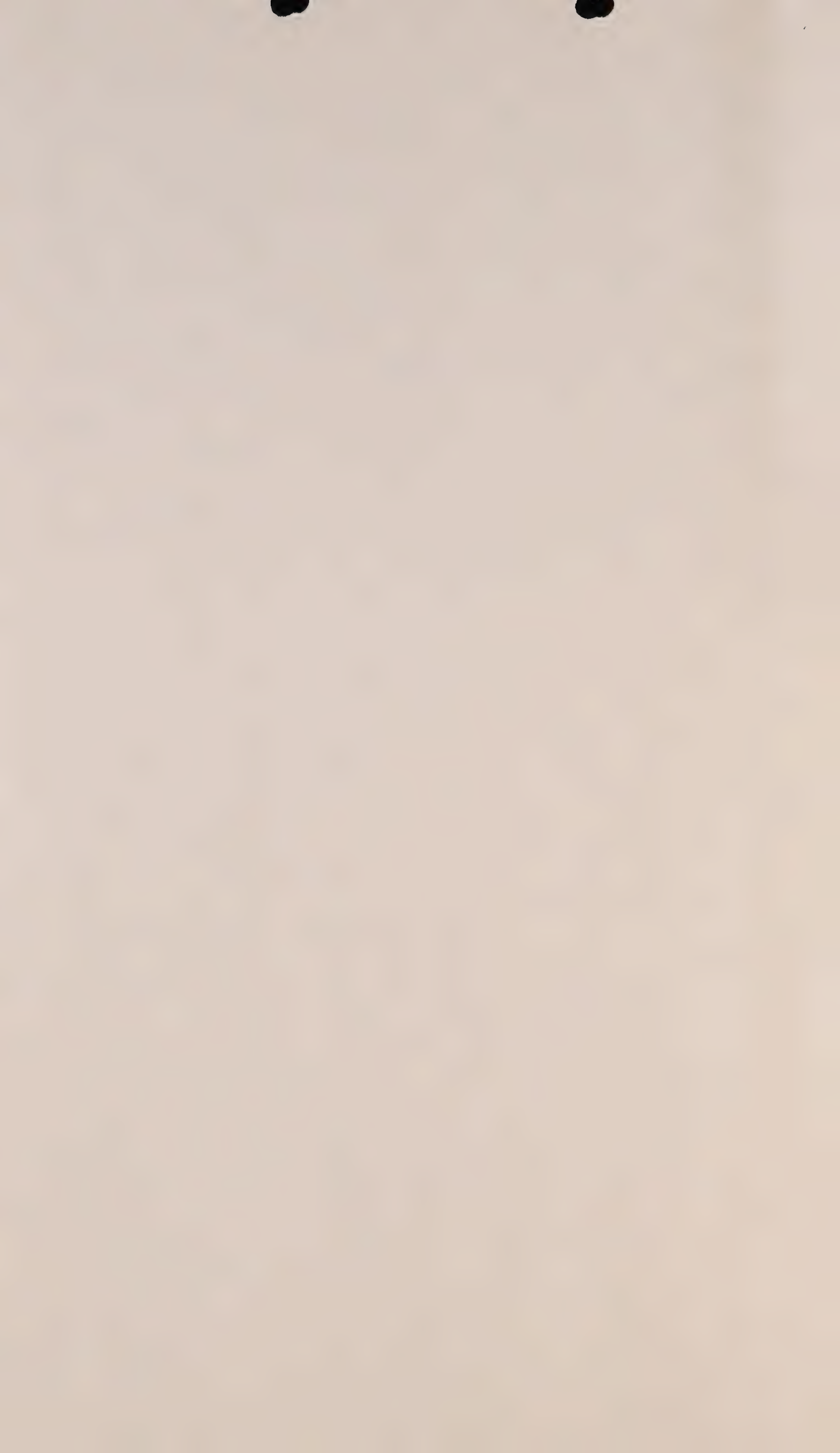
chairman of the D.C. Human Relations Commission; and that he spoke out on a range of issues including racism, poverty and the war in Vietnam.

2. It was a goal of Rev. Eaton's to provide a peaceful forum for groups seeking to address social issues and to help these groups talk to each other and to the government. He encouraged a coalition between black groups and white groups especially in regard to the war in Vietnam. (Tr.____, Eaton).

3. He was a target of the FBI's COINTELPRO-BLACK NATIONALIST program and was placed on a list called the Agitator Index. (Exhibits 98-1, 98-7).

4. He attended BUF meetings regularly. These meetings were also attended by numerous FBI and DC police informants, (Exhibit 98, Tr.____, Bynum). Information about BUF members, their names, addresses and personal conflicts, was obtained by these informants and used to disrupt BUF and discredit its leaders. Eg. Rev. Eaton received a letter sent to all BUF members warning them not to interfere with the city's narcotics trade or else they would be killed, all "except for Rev. Eaton" who was specifically exempt. He testified that "my heart sank" when he read the letter fearing the other BUF members would feel resentment or suspicious of him for being left out. He testified that some "felt it was a prank" but others were not sure. The jury could find the letter was sent by the FBI and had an adverse affect on BUF's ability to keep and attract members and on their ability to pick the issues for which they wished to petition the government for redress. (Tr.____, Eaton).

5. Plaintiff Eaton was present and participated in BUF meetings at which the alleged "head tax" issue was raised. He testified that it was voted down and that no action could be taken in the name of BUF without the unanimous approval of the steering committee, thus corroborating Rev. Douglas Moore's testimony that he did not author or send Exhibit 17. The jury could have found that the discussion of the issue within BUF was protracted and disruptive since Exhibit 18 shows that FBI informants in "racial groups" were instructed to attempt "to exploit" the issue and Exhibit 98 establishes that there were many informants in BUF (Exhibits 98-11 through 98-16 are six



different informant reports on the same 1/8/69 BUF meeting).

6. Rev. Eaton remembered the issue being discussed, remembered that many persons received the obscene "Bananas" leaflet and testified that the net effect of the issue on both groups, the New Mobe and BUF, was destructive.

7. As an organizer of the Poor People's Campaign, Rev. Eaton's First Amendment rights to organize large scale public protests were thwarted or burdened to a degree impossible to measure by the defendants' publication of false and defamatory "press releases" about the Campaign and Dr. Martin Luther King. (Exhibits 10,11,12).

8. As a result of Rev. Eaton's speaking out on the issues of the day, the FBI placed informants within his church one of whom became a trustee. This individual introduced a resolution that "the next four sermons be preached against the war" and it was noted in the informants' report to the FBI: "It may not pass but it will split the church." (Exhibit 98, memo dated 5/4/72). The harm caused Rev. Eaton and the collegial relations among the trustees by having an informant in their midst trying to split the church is self-evident. The jury could infer that Rev. Eaton felt great mental distress at learning, when he reviewed his FBI file, of defendants efforts to manipulate affairs within his church.

PART THREE Punative Damages

The jury awarded punative damages in an amount equal to one-half the compensatory damages awarded against each of the FBI defendants and the two most senior District of Columbia defendants, former Chief of Police Jerry V. Wilson and Inspector Thomas J. Herlihy. The amounts awarded, ranging from a maximum of \$3,125.00 against defendant Brennan to a minimum of \$1,562.50 against defendants Herlihy and Grimaldi, are clearly not excessive in light of the following evidence.

1. The defendants' program of interference and disruption of plaintiffs' political activities was intentional. (All witnesses, all exhibits).

2. The defendants did not act with a reasonable good faith belief that their activities were lawful; rather, they failed even to worry about it since they believed their activities would remain secret. Nowhere in any of the internal FBI memoranda produced for trial by either side is there any admonition to agents to avoid interference with lawful political protests nor was there any discussion of this problem orally by those charged with implementing the COINTELPROs. (Exhibits 1-3; Tr.____, Jones, Brennan, Grimaldi).

3. The defendants acted with reckless disregard in terms of who they targeted. Defendant Moore, who had national responsibility for COINTELPRO-BLACK NATIONALIST, could not define the term "Black Nationalist" except to say it meant a group that did not take whites into its membership. (Tr.____, Moore). Since there was no evidence that the FBI similarly targeted white groups who did not take blacks into their membership, this definition also supports a finding of racial animus, itself a basis for punitive damages.

4. Similarly, the NEW LEFT was loosely defined by defendant Brennan to include anyone the FBI deemed "was inimical to the interests" of the United States or who "advocated or engaged in violence". Since there was no testimony that any of the plaintiffs "advocated or engaged in violence" the jury could have found the defendants acted with reckless disregard of the facts in selecting the plaintiffs as NEW LEFT targets. (Tr.____, Brennan; Exhibit 3).

5. The tactics used by the defendants exceed the bounds of decency as well as legality and shock the conscience. The use of false, defamatory, racially inflammatory and obscene material to stir the wrath of one political group against another would alone support the punitive damages against the FBI defendants. (Exhibits 17-25, 10-12, 31, and 31-A). Although each FBI defendant claimed he either did not remember or was not personally responsible for writing these documents, the jury could have found these denials implausible in light of the defendants' active roles in implementing COINTELPRO either at headquarters or at the WFO.



6. The testimony of every FBI defendant established that he had the ability to reject COINTELPRO proposals yet none did. Each FBI defendant was a knowing active participant in COINTELPRO, either NEW LEFT or BLACK NATIONALIST. Brennan occupied a headquarters, policy-making position as head of all domestic intelligence operations 1970-1971 and prior to that as chief of the intelligence division responsible for COINTELPRO-NEW LEFT. Moore had the comparable headquarters policy-making position in regard to intelligence for racial matters including COINTELPRO-BLACK NATIONALIST. Jones was the liaison between WFO and headquarters and all COINTELPRO projects had to receive his approval or disapproval. Grimaldi acted as COINTELPRO-NEW LEFT coordinator for the New Left Squad in the WFO and Pangburn was an active member of the racial squad and participated in COINTELPRO-BLACK NATIONALIST.

7. The failure of the defendants Wilson and Herlihy to establish any guidelines for their intelligence operatives and the condonation if not authorization of burglary and theft to gather material supports punitive damages against them (Tr.____, Wilson, Herlihy, Acree, statements of Okeson, Marcum, Spiker). The District defendants defined their targets as loosely as did FBI defendants. Lt. Acree testified that the Intelligence Division investigated any person or group involved in "subversive activities" which he defined as "any group that was trying to undermine either the District or federal government". When pressed to fit this definition to the type groups and people actually investigated, he replied "that word 'subversive': I don't know how to describe it." (Tr.____, Acree).

8. The acts of the defendants occurred over a period of several years. This was not a case of a single bad judgment or of a quick decision made under pressure of time. There was every opportunity for the defendants to reflect and reconsider their actions.

9. The jury could properly consider the fact that the defendants were all law enforcement officials of either the federal or District of Columbia governments at the time the incidents occurred. "The fact that it is a

government official who violates the Constitution is an aggravating, not a mitigating, factor." Birnbaum v U.S., 436 F. Supp. 967,984(E.D.N.Y.1977), aff'd 588 F.2d 319(3rd Cir.1978).

10. The nature of the tactics employed by the defendants and their willy-nilly targeting of any political or social group associated with the left coupled with their evasive and disingenuous testimony at trial all combine to support/^a legitimate inference that the defendants acted with actual malice towards the persons or groups they imagined were "inimical to the interests of the United States" or "subversive". (Tr.____, Breman, Acree).

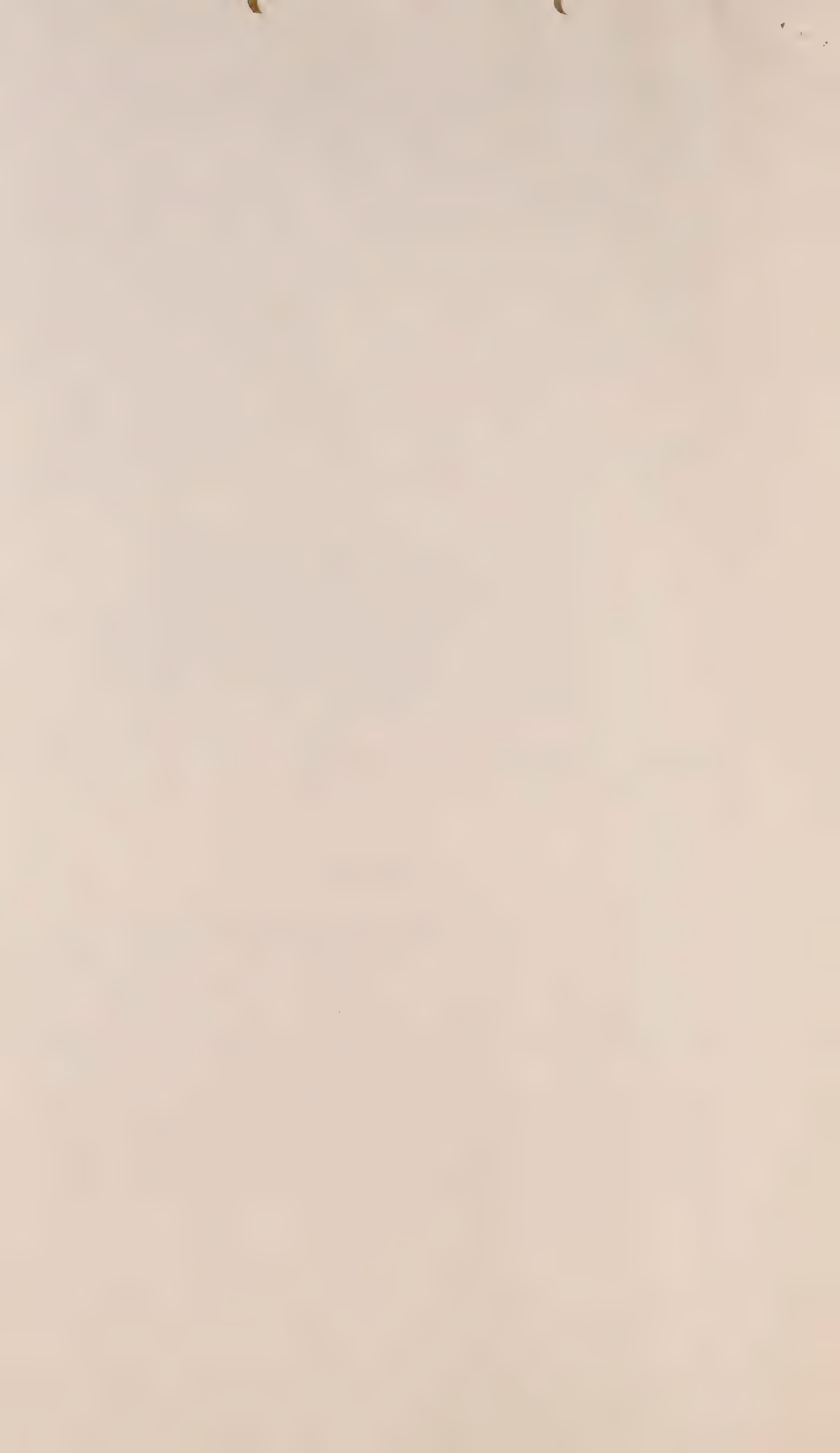
11. The jury could properly consider the effect of the defendants' conduct on American democracy and the need to warn off future government officials who step beyond the limits imposed upon them by the Bill of Rights.

The makers of our Constitution ... recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - - the most comprehensive of rights and the right most valued by civilized men.

Griswold v Connecticut, 381 U.S. 479, 478(1965), quoting J. Brandeis' dissent in Olmstead v U.S., 277 U.S. 438, 478(1928).

CONCLUSION

The evidence presented in Part One and Part Two, supra, supports the conclusion that the defendants were engaged in what amounted to psychological guerrilla warfare aimed at the plaintiffs and their organizations. There can be little doubt, given the fragile nature of voluntary political associations, that the defendants' effort succeeded in keeping some people away from demonstrations, in disrupting some demonstrations when they occurred, and in substantially burdening the plaintiffs as they tried to exercise their First Amendment rights by subjecting them to harassment, threat, and



intimidation and by interjecting false and divisive issues into the plaintiffs' political associations. The harm suffered was by no means de-minimis yet there is no easy objective criterion by which damages can be calculated. Because the harm is in large part both intangible and subjective, including the untold cost of increased personal and racial mistrust and misunderstanding, the assessment of damages in this case is uniquely appropriate for determination by a jury.

In light of the paramount position First Amendment rights occupy in our political system and the defendants' willful attempts to sabotage those rights, it cannot be said that the verdicts "exceed the maximum limit of a reasonable range".

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Of Counsel:

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(202) 544-1076

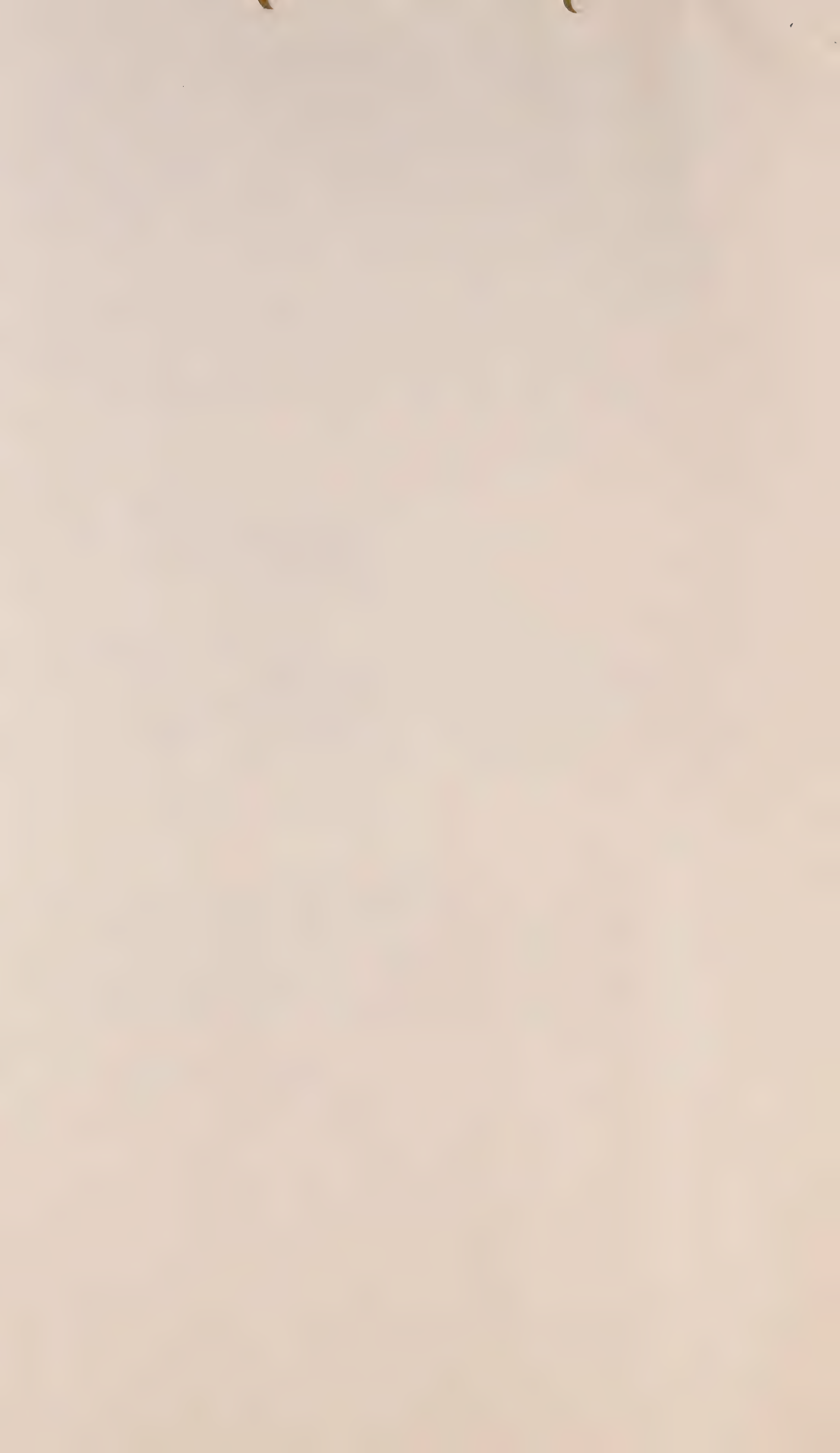
Herb Semmel (AP)
Herb Semmel
Antioch School of Law
1624 Crescent Pl. N.W.
Washington, D.C. 20009
(202) 265-9500

Counsel for Plaintiffs

Certificate of Service

I hereby certify that I have mailed, this 28th day of April, 1982, postage prepaid, a copy of the foregoing Plaintiffs' Statement of Evidence at Trial Relating to Harm to: David H. White, Esq., Dept. of Justice, 10th and Penna. Aves. N.W., Washington, D.C. 20530, counsel for FBI defendants; and to George N. Barclay, Esq., Assistant Corporation Counsel, District Building, Room 318, Washington, D.C. 20004, counsel for D.C. defendants.

Anne Pilsbury
Anne Pilsbury



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

APR 14 1982

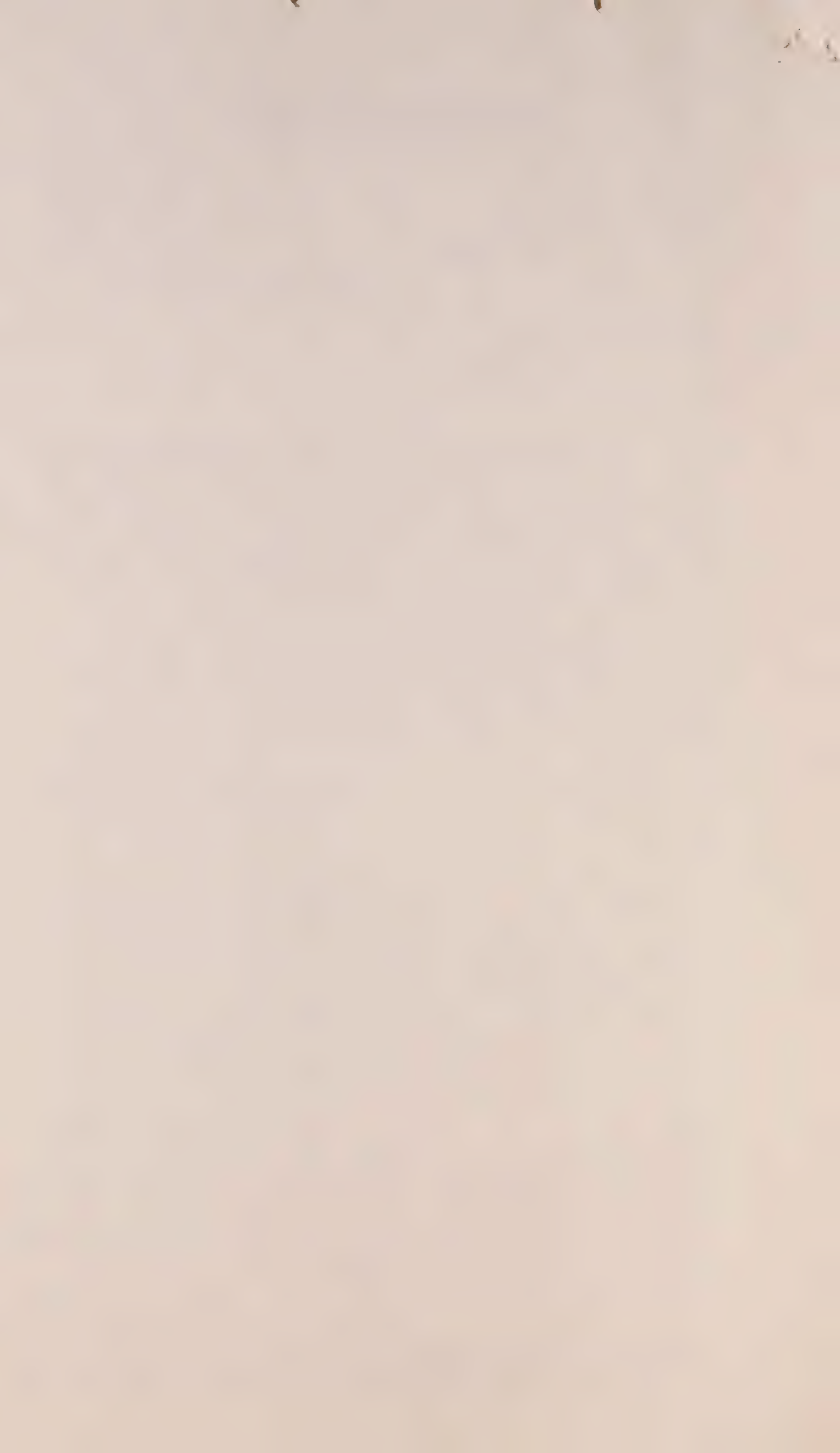
JULIUS HOBSON, et al.,)
)
Plaintiffs,)
)
v.)
)
JERRY WILSON, et al.,)
)
Defendants.)
_____)

JAMES F. DAVEY, Clerk

Civil Action No. 76-1326

ORDER

Defendants' motions for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur remain under advisement. All defendants have asserted that the damages assessed by the jury were excessive and against the weight of the evidence. See Memorandum in Support of Motion of Defendants Brennan, Moore, Jones, Pangburn and Grimaldi (filed Jan. 4, 1981) at 23-25; Memorandum in Support of Motion of District of Columbia Defendants (filed Jan. 4, 1981) at 29-30, 31, 33-34. In determining whether the motion for a new trial or remittitur should be granted, the Court must consider whether "the verdict is 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate.'" Taylor v. Washington Terminal Co., 409 F.2d 145, 149 (D.C.Cir. 1969) (quoting Graling v. Reilly, 214 F.Supp. 234, 235 (D.D.C. 1963)). Moreover, a court may be required to set aside an award of punitive damages if the amount is "deemed to be excessive or against the weight of the evidence, or larger in amount than the court thinks it ought justly to be." Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 662 (D.C.Cir. 1966) (footnotes omitted). In considering defendants' motions, the Court must therefore consider the specific items of evidence of damage, or lack thereof, adduced at trial that the jury may have considered in its calculations. See generally Washington v. National Railroad Passenger Corp., 477 F.Supp. 1134 (D.D.C. 1979); Airlie Foundation v. Evening Star Newspaper Co.,



337 F.Supp. 421, 431-32. Discharge of the Court's obligation would be facilitated by submissions from the parties noting the portions of the proof at trial upon which they now rely for their contentions regarding the amount of the verdict. Accordingly, it is this 14th day of April 1982 hereby

SD ORDERED: that the parties may file on or before April 29, 1982 brief and succinct statements of the specific evidence, documentary and testimonial, upon which they rely as evidence of damages (or lack thereof) in connection with their contentions regarding the amount of the verdict; and it is further

ORDERED: that the parties may file replies to the statements that may be filed on or before April 22, 1982, on or before May 4 ~~April 27~~, 1982.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)

Plaintiffs)

v)

JERRY WILSON, et al.,)

Defendants)

Civil Action

No. 76-1326

PLAINTIFFS' RESPONSE TO
DEFENDANTS OPPOSITION TO
REQUEST FOR ATTORNEYS' FEES

Following a jury verdict in favor of eight of the nine plaintiffs in the aggregate amount of \$711,937.50, plaintiffs moved for an award of attorneys' fees pursuant to 42 U.S.C. §1988.^{1/} Both sets of defendants, D.C. and federal, have opposed the motion on various grounds. The contentions of the District of Columbia and federal defendants will be treated separately.

I. Contentions of Federal Defendants

A. Federal defendants claim 42 U.S.C. §1988 does not apply to this action.

Attorneys fees are recoverable in actions brought under sections 1981, 1982, 1983, 1985 and 1986 as well as certain statutes not here pertinent. This case was brought under §1985, alleging a conspiracy by defendants to violate the First Amendment rights of certain groups of citizens, viz. blacks and "New Left" activists. This cause of action, together with the claim arising directly under the First Amendment, Bivens v Six Unknown Agents, 403 U.S. 388(1971), was at the core of the case. The suggestion that §1985 was pled only in order to create liability for attorneys fees is frivolous and untrue. Furthermore, even if plaintiffs had not prevailed on their claims under §1985 but had prevailed only on the Constitutional "common law"

^{1/} Shortly before the trial in this case, the Equal Access to Justice Act, 28 U.S.C. §2412, became effective. It appears to provide an alternative basis for assessing attorneys' fees in this case against the federal defendants and/or the United States.



damages claims under Bivens, they would still be entitled to recover attorneys' fees where the same facts gave rise to both types of claims. Lund v Affleck, 587 F.2d 75 (1st Cir.1978).

B. Federal defendants claim plaintiffs are not "prevailing parties."

This contention does not warrant extensive comment. Eight of nine plaintiffs were awarded between \$80,000.00 and \$90,000.00 each. By any reasonable reading of the term "prevailing party", these eight plaintiffs prevailed. The defendants' argument relies on the large numbers of defendants who were dismissed. In another context, this fact might have some relevance but in this case it does not.

The actions complained of in this case arose out of clandestine intelligence operations conducted by the F.B.I. and the District of Columbia police department against the plaintiffs and others like them. Part of plaintiffs' counsels' job was to figure out which F.B.I. and Metropolitan Police Department officials were responsible. This information was hardly a matter of public record.

Initially the suit was filed against all persons known to be employed in the F.B.I. Washington Field Office and in the D.C. M.P.D. Intelligence Division in the time period covered by the complaint. It was only through extensive discovery that plaintiffs were able to eliminate some of these persons as defendants and add others who, it turned out, had actual responsibility for the surveillance of the plaintiffs and the attempts to interfere with their First Amendment activities. This trial and error approach to identifying the appropriate defendants was made necessary by the defendants' understandable reluctance to come forward and indicate which of them were primarily responsible. Even during the trial, the federal defendants continued to insist, not that the acts alleged did not occur, but that somebody else was responsible for them. In such a situation, the fact



that a number of defendants were dismissed - - often voluntarily by the plaintiffs - - in no way diminishes the plaintiffs' ultimate victory and in fact highlights one of the things that made this case such a difficult one to present.

C. Federal defendants claim the fee requested is so excessive that no fee should be granted.

Plaintiffs' application for fees indicates a total of 4,385.9 hours for all legal personnel. Before any adjustment under Copeland v Marshall, 641 F.2d 880 (D.C.Cir.1980) for the complexity of the case, the fee sought is \$290,775.80. Taking into account that this represents the preparation and presentation of nine separate cases, joined in one action, and comparing this request with fee awards in other cases, it becomes clear that the request is hardly excessive. Cf. Lamphere v Brown University, 610 F.2d 46(1stCir.1979), (\$272,600. fee for 3500 hours for a single plaintiff case); Herrera v Valentine, 653 F.2d 1220 (8th Cir.1981), (\$88,214.95 fee awarded for simple police brutality case); EEOC v Sage Realty Corp., ____ F.Supp. ____; 26 F.E.P. 1319 (D.C.S.D.N.Y. Aug.1981), (\$90,365.00 fee awarded for single Title VII case in which back pay of \$33,000.00 was recovered); Copeland v Marshall (\$206,000 fee sought for 3,602 hours work in a standard but protracted Title VII case in which the government conceded liability before trial; \$160,000 fee awarded).

Plaintiffs acknowledge that their fee application includes time spent on the unsuccessful Women Strike for Peace case. It was not possible in the short time available to make an estimate as to how much of the total time was devoted solely to this plaintiff.

There was no legal research that was exclusively devoted to any one plaintiff. The only element of legal work which can be isolated by plaintiff is the review of files. The application includes 170 hours for time spent reviewing WSP files and preparing WSP witnesses for trial. This accounts



for \$9,142.00 of the basic fee request before any multiplier is applied. Plaintiffs have reduced their fee request by this amount.

The tedious and time consuming job of reviewing barely intelligible files from the F.B.I. on Julius Hobson and the E.C.T.C. are included in the fee request because this work assisted greatly in presentation of the surviving plaintiffs' cases. So, too, depositions taken of persons later dismissed as defendants helped in the tasking of figuring out who was responsible for what.

Law Students

The four law students who worked on the case did so under the aegis of the Urban Law Institute of Antioch School of Law. They are in the same position as law clerks or paralegals working for a legal services program and compensation for such personnel has been widely recognized. Holt v Hutto, 363 F. Supp.194, rev'd. on other grounds, 505 F.2d 194; E.E.O.C. v Sage Realty Corp., 26 F.E.P. 1319. Plaintiffs concur, however, that there should be some reduction in the amount of time claimed in view of the fact that some of the time spent may have been necessary for teaching purposes but not essential to trial preparation. Because the law students did perform essential work of a paralegal nature in cross-referencing files and preparing for depositions, as well as some assistance on research and, in the case of Anthony Murray, vital help in keeping track of documents at trial, they are entitled to be compensated. But because of the difficulty of factoring out the time that was arguably educational rather than essential to the litigation, plaintiffs will reduce the request for fees for the law students by forty percent (40%). This reduces the overall fee requested \$6,890.52.

Miscellaneous comments on "excessive" fees. (See pages 8-14 of federal defendants' memorandum in opposition to counsel fees.)

1. Plaintiffs agree that the 60 hours travel time for attorney Anne Pilsbury should not be compensated at \$75.00 an hour. An appropriate



figure would be \$20.00 an hour.

2. Attorneys Mary Pike and Burton Wechsler, who assisted in preparation of jury instructions at the end of trial, did so to help out trial counsel and are not seeking attorneys fees; therefore, the request for \$1,500.00 and \$2,000.00 for these two attorneys is withdrawn.

3. Attorney Pilsbury claimed time for the deposition of Kolego and Shaffler because this time had been set aside for the depositions and was spent waiting for the parties to appear. During trial, attorney Pilsbury did routinely work through the lunch hour preparing witnesses and/or questions for the afternoon.

4. The defendants' argument that to pay fees on account of the work of the late David Rein would be a "windfall" is in poor taste. Surely it would be a windfall to the defendants if they could avoid paying fees to David Rein's widow and surviving law partners just because of David Rein's untimely death.

5. The request for \$100.00 an hour for trial time for both attorneys Schember and Pilsbury is reasonable. This was not a case which could be tried by one, or even two lawyers. Even while the trial was going on, counsel and the Court were still engaged in discovery hearings that often took place before the actual trial began in the mornings. There was more than enough work to keep all three trial counsel busy. Nowhere in attorney Pilsbury's affidavit does she state that she returned to Washington, D.C. to conduct the trial because attorney Schember lacked trial experience. She returned because she was familiar with the case and it required additional counsel to try it, as does any complex case.

All of the above reductions agreed to by the plaintiffs are listed in a summary chart attached for the convenience of the Court and counsel.



II District of Columbia defendants' opposition to award of attorney fees.

As noted in the Plaintiffs' Motion for Time Within Which to Respond on attorneys fees, counsel have not been served with the District of Columbia defendants' memorandum of points and authorities opposing counsel fees and so it is not possible to respond to it. But based on the chart which has been served, it appears the District has adopted the approach of the federal defendants in arguing that there should be a 50% reduction in fees because only ten of twenty original District defendants had judgment entered against them. For the reasons stated above, the approach has no merit.

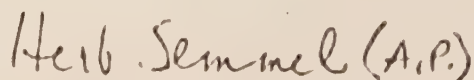
The District also argues that the plaintiffs did not prevail on all issues. The only issues on which the plaintiff could be said not to have prevailed were the individual liability of defendants Bynum and Kolego and since the plaintiffs rights were vindicated, even for acts done by these two defendants, by the verdict against the District of Columbia municipal corporation and against Kolego and Bynum's supervisors, the plaintiffs still stand as prevailing parties and no reduction is in order. It is not necessary to prevail on every theory against every defendant to be entitled to fees. Where issues are interrelated and arise out of a single complex of facts, as here, success on any major issue entitles the plaintiffs to fees. Arkansas Community Organizations v Arkansas State Board of Optometry, 468 F.Supp 1254(D.C. Ark.1979).

Respectfully submitted,



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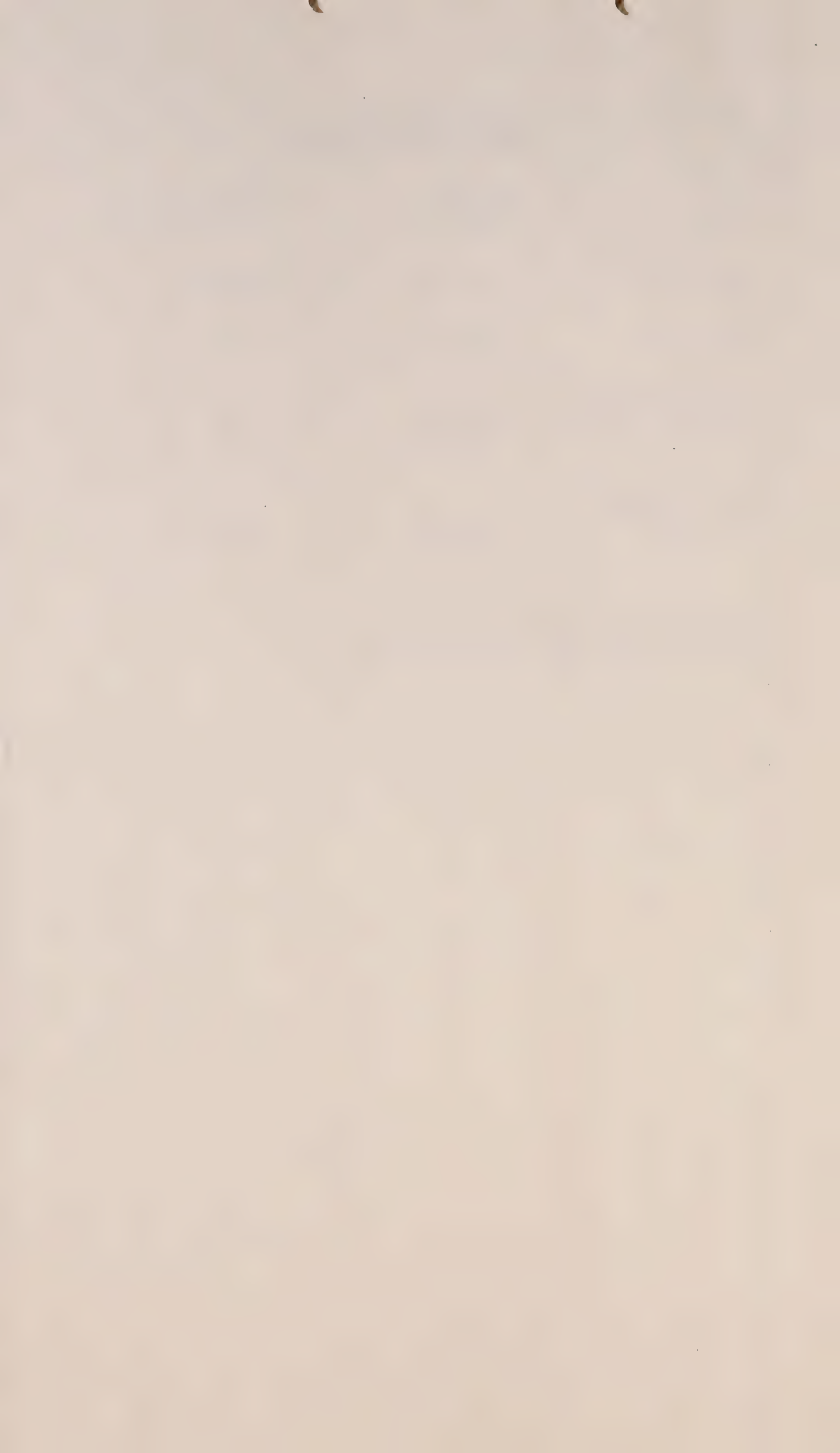
Counsel for Plaintiffs



SUMMARY OF REDUCTIONS IN
REQUEST FOR ATTORNEYS FEES


<u>Reason</u>	<u>Base Amount Reduction</u>	<u>Effect on Multiplied Amount</u>
Women Strike for Peace	9,142.00	18,284.00
Law students	6,890.52	n/a
Withdrawn request for Pike and Wechsler	1,500.00 2,000.00	n/a n/a
Attorney's travel time at \$20/hr. (Pilsbury)	3,300.00	6,600.00

TOTAL BASE FEE REQUESTED
BEFORE APPLYING MULTIPLIER = \$267,943.28



CERTIFICATE OF SERVICE

I hereby certify that I have mailed, postage prepaid, a copy of the foregoing Plaintiffs' Response to Defendants' Opposition to Request for Attorneys' Fees this 25th day of March, 1982 to: David H. White, Esq., Department of Justice, counsel for FBI Defendants, and to George N. Barclay, Esq., Assistant Corporation Counsel, counsel for District of Columbia defendants.


Anne Pilsbury



Anne Pilsbury
ATTORNEY AT LAW
17 Danforth Street - Norway, Maine 04268

TELEPHONE
207 / 743-5583

CENTER LOVELL
207 / 925-1144

Clerk, U.S. District Court
3rd & Constitution Avenue
Washington, D.C.

Date: March 18, 1982

RE: Hobson, et al., v Wilson, et al.

DOCKET NO. 76-2631

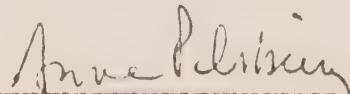
1326

DEAR CLERK:

Enclosed for filing please find the following court pleading:
Motion for Time Within Which to Respond on Opposition to Attorneys fees,
Memorandum of Points and Authorities and Order

Also enclosed is the necessary filing fee in the amount of _____

Thank you.



ANNE PILSBURY, Esq.

Enc.

Copy to: David H. White, Esq.
George N. Barclay, Esq.

(2)

(3)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)
)
 Plaintiffs)
)
)
 v)
)
)
 JERRY WILSON, et al.,)
)
 Defendants)
)
 _____)

Civil Action

No. 76-1326

MOTION BY PLAINTIFFS FOR TIME
WITHIN WHICH TO RESPOND TO F.B.I.
AND DISTRICT OF COLUMBIA DEFENDANTS
OPPOSITION TO ATTORNEYS' FEES

The plaintiffs hereby move this Honorable Court for leave to have until March 29, 1982 to respond to the memoranda by the F.B.I. and District of Columbia defendants in opposition to plaintiffs' request for attorneys' fees.

As grounds for their motion, plaintiffs refer the Court to the attached memorandum of points and authorities.

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Herb Semmel
Herb Semmel
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(202) 265-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs)	
)	
	)	Civil Action
v)	
	)	No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants)	
)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR
TIME WITHIN WHICH TO RESPOND TO F.B.I.
AND DISTRICT OF COLUMBIA DEFENDANTS'
OPPOSITION TO ATTORNEYS' FEES

Judgment was entered on the jury verdicts in this case on January 4, 1982. At that time, the law was unsettled as to when a motion for fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, should be filed in order to be timely. Since some courts had required such motions to be filed within ten days of judgment pursuant to Fed. R. Civ.P. 59(e), counsel here did so. (The recent decision in White v New Hampshire Department of Social Services, ___ U.S. ___, 50 L.W.4255 (dec'd. March 2, 1982) has now made clear that the 10 day time limit of Rule 59 does not apply to attorneys fees motions and that each judicial circuit is free to adopt local rules governing timeliness.)

Because of the haste in which the fees motion had to be filed in this case, and in order to avoid any possible argument that fees had been waived, application was made for all counsel and law students who had worked on the case based on individual time sheets or estimates by other attorneys. There was no opportunity prior to filing the motion to carefully compare the time sheets of various attorneys to check for unnecessary duplication of efforts or to consider whether all the time spent would actually be billed if these had been private fee-paying clients. It is entirely likely that such a review would result in at least a slight

reduction of the fees requested. Plaintiffs are requesting this limited extension of time to perform this task as well as to respond to the substantive arguments raised by the defendants' motions.^{1/}

Anne Pilsbury

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Herb Semmel

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(202) 265-9500

Attorneys for Plaintiffs

^{1/} Plaintiffs would point out that they have never received the District of Columbia defendants' memorandum in opposition to attorney fees which, according to other pleadings, was filed Feb. 26, 1982. This oversight has been twice pointed out to counsel for the D.C. defendants. The opposition of the F.B.I. defendants was received March 17, 1982.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, <u>et al.</u> ,)	
)	
Plaintiffs)	
)	
	)	Civil Action
v)	
	)	No. 76-1326
)	
JERRY WILSON, <u>et al.</u> ,)	
)	
Defendants)	
)	

ORDER

Upon consideration of the plaintiffs' motion to have until March 29, 1982 to respond to the defendants' memoranda in opposition to an award of attorneys' fees, it is, this _____ day of March, 1982,

ORDERED: That the plaintiffs shall have until March 29, 1982 to prepare and file their response to the defendants' memoranda on the issue of attorneys' fees.

UNITED STATES DISTRICT JUDGE

Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Plaintiffs' Motion for Time Within Which to Respond on Opposition to Attorneys Fees, Memorandum of Points and Authorities and Order this 18th day of March to:

David H. White, Esq.
10th & Penna. Ave. N.W.
Washington, D.C. 20530

George N. Barclay
Asst. Corporation Counsel
District Building
Washington, D.C. 20004

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

Civil Action

No. 76-1326

FILED

MAR 17 1982

ORDER

JAMES H. [unclear], Clerk

This cause having come before the Court on motion by the federal defendants for an enlargement of time to and including March 1st, 1982, within which to reply to plaintiffs' motion for attorneys' fees and for bifurcation of proceedings relating to attorneys' fees, and the Court being fully advised in the premises, it is this 14th day of March, 1982,

ORDERED that the motion for enlargement of time to and including March 1st, 1982, within which federal defendants may respond to plaintiffs' motion for attorneys' fees, be, and hereby is, granted; and it is further

ORDERED that the attorneys' fee issue will be resolved in two stages, with the Court addressing first whether attorneys' fees should be awarded and in what amount, and addressing second how payment of the award should be apportioned among the defendants.

Louis F. Quarles
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY WILSON, et al. :
Defendants :

REPLY OF THE DISTRICT OF COLUMBIA DEFENDANTS TO PLAINTIFFS'
OPPOSITION TO THE MOTION OF THE DISTRICT OF COLUMBIA
DEFENDANTS' JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE
ALTERNATIVE FOR A NEW TRIAL OR IN THE ALTERNATIVE, FOR A
REMITTITUR

This civil action was commenced on July 16, 1976, by a complaint which alleged violations of plaintiffs' Constitutional Rights by the Federal Bureau of Investigation and the Metropolitan Police Department, D.C.

On December 23, 1981 the jury returned verdicts against all the Federal defendants and all but two of the District of Columbia defendants. On December 31, 1981 the District of Columbia defendants filed their motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or, in the alternative, for a remittitur. On January 4, 1982 the District of Columbia defendants filed a supplemental memorandum of points and authorities. On February 10, 1982 after two extensions of time, plaintiffs filed their opposition to the District defendants' post-trial motion. The following reply is submitted in response to plaintiffs' opposition. For the sake of clarity, the responses contained in this reply are arranged in the same order as the arguments in plaintiffs' opposition.

I

Insufficient Evidence, Statute of
Limitations and Qualified Immunity.

A

Insufficient Evidence

The substance of the testimony relating to each plaintiff is set forth in pages 4-13 of defendants Memorandum. As is amply demonstrated therein the injuries allegedly sustained by plaintiffs were, in fact, non-existent or, in no way connected to the conduct of the District defendants. In response, plaintiffs' list eleven facts upon which they argue, the jury could have reasonably concluded that the District defendants proximately caused plaintiffs damage. (See p. 2, Plaintiffs' Opposition). Examination of these "facts" reveals that none of them truly support a verdict against the District of Columbia defendants.

"Facts" (a), (b) and (c): (a) files were maintained on all demonstrator groups; (b) use of informants. (c) Hobson files, lack of guidelines.

These "facts" standing alone prove nothing. Intelligence gathering operations which result in files or any other compilation do not, under the facts of this case, give rise to a constitutional violation. (See Defendants' Memorandum, p. 21, 22 and cases cited therein). Plaintiff offered no evidence demonstrating how these facts impinged upon any of their constitutional rights or proximately caused their injuries recognized by law. Specificity as to conduct, defendant and harm is utterly lacking. Nor, indeed, is any specificity provided in plaintiffs' opposition.

"Facts" (d): disruptions of demonstration by District of Columbia police agents.

Such activity is beyond the scope of mere intelligence gathering and as such is actionable. However, there was no proof that such activity was undertaken by any District of Columbia agent. One alleged, provocateur, Jan Francis, was not a member of the Intelligence Division or under the supervision of any District of Columbia defendant. The second identified provocateur, Ann Kolego-Markovich was found not liable. Accordingly, there was no competent evidence that any District of Columbia defendant or agent engaged in such activity. Thus, there is no connection between this fact and any plaintiff and/or defendant.

"Fact" (e): theft of mailing lists and contributions list from 1029 Vermont Avenue

Evidence on this issue indicated that the injuries sustained, if any, by the Washington Peace Center resulted from activities of the FBI. There was no testimony that the activities of the Metropolitan Police Department interfered in any way with activities of this plaintiff. (See defendant memorandum p. 13).

"Fact" (f): smashing of a xerox machine at 1029 Vermont Avenue.

While Spiker may have boasted about such an incident in his statement, the only evidence was the testimony of Sidney Peck that the machine was out of order. No plaintiff recalled a damaged machine or any harm from it, and it is certainly plausible, as Sidney Peck admitted, that the machine was simply out of order due to a mechanical malfunction.

"Fact" (g): contacts between the FBI and the Metropolitan Police Department.

Such contacts are legitimate and proper law enforcement function and do not give rise to constitutional violations (See p. 22, Defendant Memorandum).

"Fact" (h): destruction of Intelligence Division files in 1974.

Several District of Columbia defendants testified that the destruction was a routine purging of outdated material undertaken subsequent to the reorganization of the Intelligence Division. In light of the total absence of evidence to the contrary the jury could not properly have inferred an ulterior motive as suggested by plaintiffs.

"Fact" (i): money available to Metropolitan Police Department to augment Intelligence operation.

Plaintiffs' assertion that such a grant contributed to improper or illegal activity is unsupported by any evidence and is incorrect on its face.

"Fact" (j): Three plaintiffs' witnesses "suspected" the role of Steve Wilcox in disrupting telephone service to New MOBE Offices.

This allegation is sheer conjecture by plaintiffs, as is evidenced by plaintiffs' own use of the word "suspected." Moreover, even these suspicions were rebutted by direct testimony that such an individual was never employed by the District of Columbia defendants for any capacity.

"Fact" (k): unknown agents in under cover capacity.

Aside from the fact that the use of under cover agents is a legitimate law enforcement technique, there was no testimony as to these unknown agents ^{/what} did or how anything they did infringed upon any constitutional protected right of any of the plaintiffs'.

It is evident that these "facts" do little or nothing to fill the gaps and specific insufficiencies of evidence underlying plaintiffs' claims. Even if they were all true, they would only become actionable if they resulted in specific harm to a specific plaintiff and were causally connected



with the act of a defendant or defendants. Neither the evidence adduced by plaintiffs nor their opposition memorandum makes such a connection.

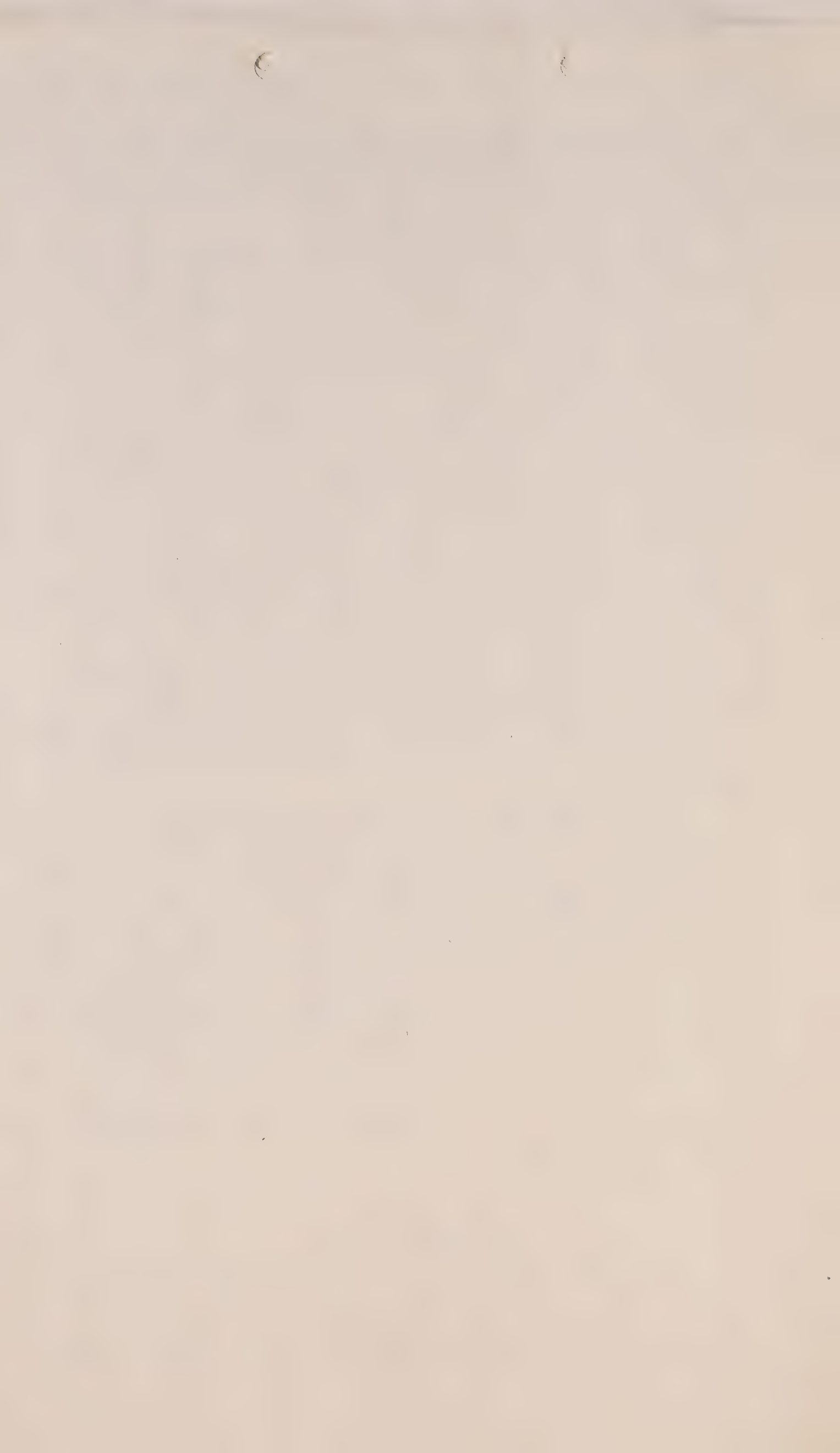
As to plaintiffs' claims regarding electronic surveillance, physical surveillance and supplying the public with false information. No evidence was adduced at trial which could support a finding of liability against the District defendants or these issues. Plaintiff Waskow was the only identified plaintiff overheard through electronic surveillance and given the uncertainty of whether the "bug" was placed through court order or one party consent, liability is unfounded. Moreover, whether consensual bugging is transgressed when the consenting party is absent is, by plaintiffs' own admission, an open question. Under these circumstances, there is no way it can be alleged that the District of Columbia defendants lacked a good faith reasonable belief in the propriety of the one party consensual bugging.

In sum, there was, as a matter of law insufficient evidence that particular District of Columbia defendants violated any rights of particular plaintiffs or proximately caused therein any compensable injuries. As such, there was no basis from which a jury could reasonably infer liability against the District of Columbia defendants. This observations is highlighted by plaintiffs inability to specify any such evidence in their opposition. Therefore, the District of Columbia defendants are now entitled to a judgment notwithstanding the verdict.

B

Qualified Immunity

Plaintiffs' argument against qualified immunity is unpersuasive in that it suggest improper inferences drawn by the jury and fails to include any competent evidence upon



which qualified immunity could be rebutted. There was no evidence to suggest that the destruction of the files was done with ulterior motives. Indeed, it was explained by several witnesses. Nor should the jury have been allowed to draw any inferences from the failure of the District of Columbia defendants to produce additional witnesses since plaintiffs were free to call any witness they chose to call and since, quite properly, no missing witness instruction was given. Similarly, the mere fact that some of the organizations which were infiltrated were peaceful does not lead to a conclusion that the District of Columbia defendants acted unreasonably or in bad faith. Infiltration is not per se actionable, and the mere fact of such infiltration cannot overcome defendants qualified immunity. (See defendants memorandum of points and authorities at pp. 20-22).

C

Statute of Limitations

Plaintiffs fail to address any of the issues raised by the District of Columbia defendants on this issue. Instead they refer to three points, none of which is particularly relevant. As stated repeatedly there was no evidence that the destruction of the files was an attempt to conceal evidence. The only evidence was that the files were purged of out-dated material (see defendant memorandum p. 23, 24). Therefore, the jury could not infer that the purge constituted fraudulent or deliberate concealment. Secondly, the District of Columbia defendants were under no obligation to make their files public. Accordingly there were no additional facts to provide evidence of aggravation upon which a jury could find fraudulent or deliberate concealment. See Smith v. Nixon, 196 U.S. App. D.C. 276, 606 F.2d 1183, 1191, n. 44 (1979).

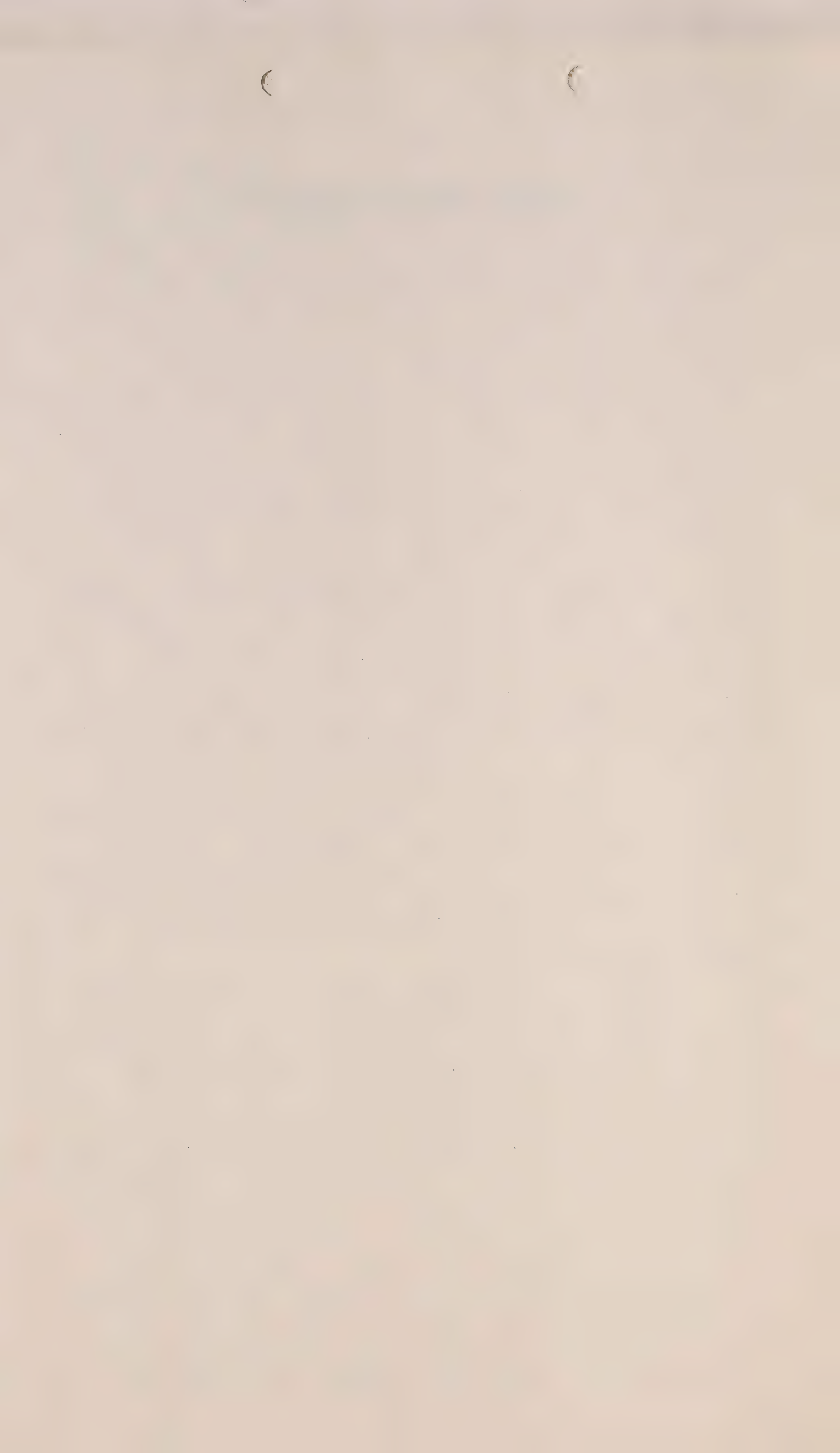


II

Liability under §42 U.S.C. §1985(3) and/or civil conspiracy.

As consistently maintained by the District of Columbia defendants, neither the District of Columbia nor any of its agents were subject to §1985(3) at any time relevant to this lawsuit. See District of Columbia defendants' pre-trial brief, District of Columbia defendants' memorandum p. 14-15). It is correct, as plaintiffs and the court note, that there is no state action requirement under §1985. It is erroneous, however, to then conclude that "the issue of whether the District of Columbia is a state a territory" loses its significance. Both District of Columbia v. Carter, 409 U.S. 418 (1973) and Hurd v. Hodge, 334 U.S. 24 (1948) attest to the significance of the issue. Plaintiffs' reliance on Hurd is inapposite since it is concerned with a statute deriving from the Civil Rights Act of 1866 at not the KKK Act of 1871 from which §1985 derives. The important point is that for §1985(3) to apply, the prohibited activities must have occurred in a "state or territory". Since the District of Columbia is not a "state or territory" within the meaning of section 1985(3), that provision cannot be applied in the case at bar.

Plaintiffs alleged and the jury found three conspiracies one involving the District of Columbia defendants, another involving the Federal defendants at a third consisting of both District of Columbia and Federal defendants. As stated in District of Columbia defendants' memorandum under the facts of this case, as a matter of law, no conspiracy could exist among the District of Columbia defendants. (See District of Columbia defendants' memorandum p. 16). The named District of Columbia defendants were all employees of a single entity and acted in furtherance of the policy of that entity. See Edmonds v. Diller 485 F. Supp. 722,



729 (N.D. Ohio, 1980). See also 52 A.L.R. Federal 106 and cases cited therein. For the same reasons the District of Columbia itself cannot conspire with itself through its agents. These points were not addressed in plaintiffs' opposition and should be deemed conceded.

Likewise plaintiff does not respond to the District of Columbia defendant argument pertaining to the Metropolitan Police Department, FBI conspiracy except to the extent that they allege both entities targetting the same class. Plaintiffs fail to address the legitimacy of inter agency cooperation, differing objectives and lack of an agreement as raised in pages 18-19 of defendants memorandum. The evidence adduced at trial and alluded to ^{/in} plaintiffs' opposition clearly fails to support a finding of a joint conspiracy.

III

Respondeat Superior

Plaintiffs mistakenly confuse policy with conduct. Under Monel v. N.Y.C. Department of Social Services, 436 U.S. 658 (1978) a municipality may not be liable under the theory of respondeat superior for constitutional torts. The mere fact that the District defendant were involved in intelligence work, which is a legitimate function, and the fact that misconduct may have occurred in some instance is not sufficient to impose liability upon the District of Columbia. There is simply no affirmative link between the adoption of the intelligence gathering policy and the alleged police misconduct which shows authorization or approval of such misconduct. See Rizzo v. Goode, 428 U.S. 362 (1976). (See defendant memorandum p. 25).



IV

Punitive Damages

Contrary to plaintiffs' assertion, there was no evidence that defendants Wilson and Herlihy either condoned or encouraged any alleged misconduct. Being high level supervisory personnel, they were not intimately connected with the day to day activities and can hardly be said to have acted with reckless disregard of plaintiffs' rights.

Finally, neither defendant is now employed by the District, both having retired. Accordingly neither the conduct of these defendants nor their present positions justify an award of punitive damages to deter any future conduct by them.

V

Inconsistent Verdicts

The issue of inconsistent verdicts was fully addressed
/and
in defendants memorandum supplemental memorandum. Plaintiffs' opposition does not, in fact, respond fully to the long list of inconsistencies explained at great length in defendants' memorandum. See defendants' memorandum, pp. 28-30 and defendant supplemental memorandum).

VI

Multiple Recovery

Plaintiffs' claim that there wasn't a multiple verdict because, according to plaintiff, the jury "determined an over all figure and then divided this sum by the number of defendants it found liable, proportionating it according to culpability." (Plaintiffs' opposition p. 9). Even if that were the case, it would indicate only that the jury improperly applied a comparative liability theory in determining damages. In fact, by assessing separate awards against each defendant, rather than one compensation to each



plaintiff, the jury effectively multiplied the each award's to plaintiff by a factor of thirteen. (See defendant memorandum, pp. 29-30).

VII

Higher Award Against the District of Columbia.

It remain inexplicable how the District of Columbia as the employer of the individual District defendants and who can only act through its employees and not separately from then can be assessed separate and greater awards in addition to the awards against the individual District employees (see defendants' memorandum, p. 30). The District cannot be held liable under respondeat superior for constitutional torts of employees. (See Morell v. N.Y.C. Department of Social Services, 436 U.S. 568 (1978), and it can hardly be held liable, as plaintiff suggest, for constitutional torts of unidentified actors.

VIII

District Defendants liable for a Greater Share of the Total Damages Than Federal Defendants

Clearly the great weight of evidence was against the Federal defendants. The only District connection to this evidence was through the alleged conspiracies, the existence of which was unsupported legally and factually (see this reply, ante). Plaintiffs' assertion that "there is no requirement that an individual conspiritor be assessed only that amount which corresponds directly to his degree of involvement" (Plaintiffs' opposition, p. 10), Flies in the face of plaintiffs' attempt to justify the jury's "proportioning" the jury award, which is contained in plaintiffs' defense of the multiple verdict on page 9 of plaintiffs' opposition.

IX

Contact with an excused juror

Plaintiffs' counsel's contacts with the excused juror were clearly in violation of the local rule 1-28 since that rule prohibits any contact with jurors both before and after discharge without prior court approval. See defendants' memorandum, p. 32. Plaintiffs' attempt to twist the clear import of Rule 1-28 is suprising, at best. Plaintiffs' explanation obviously does not meet the question of unfair advantage which plaintiffs obtained in using information from the contacted juror in formulation their closing arguments.

X

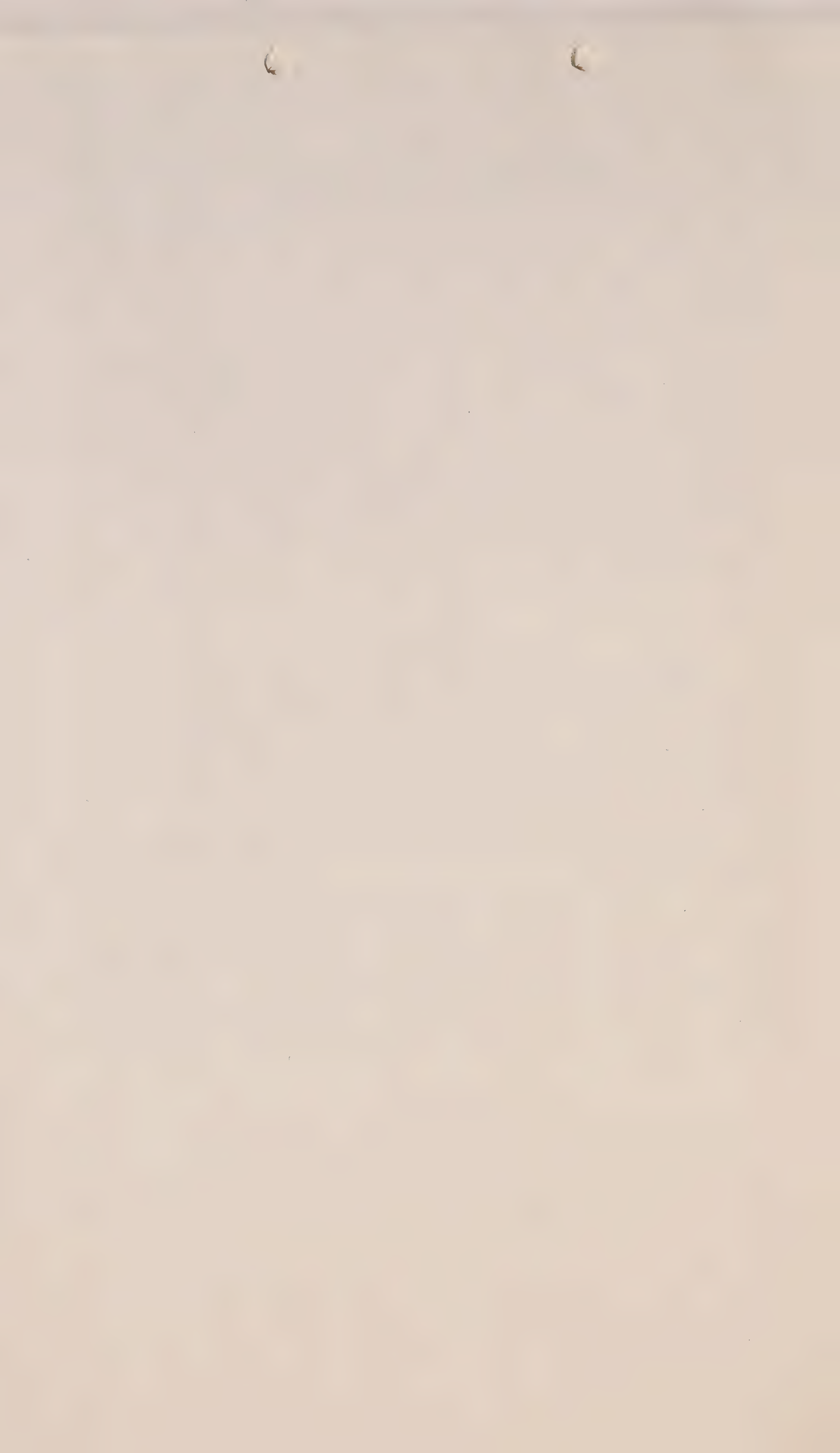
Excessive Verdict

The fact that plaintiffs' were not aware of the surveillance activities until years later (according to plaintiffs) belies their argument that they suffered any to significant emotional harm or that the conduct of the District defendants' thwarted plaintiffs' activities in any significant way.


Thus, the amount of this judgment is totally out of proportion to any harm that has been suffered by plaintiffs. Bearing no rational ralationship to the harm, it is excessive as a matter of law. (See defendants' memorandum pp. 33-34).


Conclusion

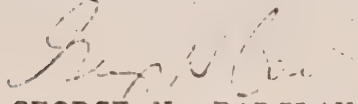
Based on the foregoing, the District of Columbia defendants respectfully move this court to set aside the verdict returned by the jury in this cause on December 23, 1981, and notwithstanding the same, to enter judgment in their favor. In the alternative, the District of Columbia defendants move this court to grant them a new trial or to



ST)
grant a substantial remittitur.

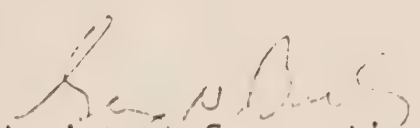

JUDITH W. ROGERS
Corporation Counsel, D.C.

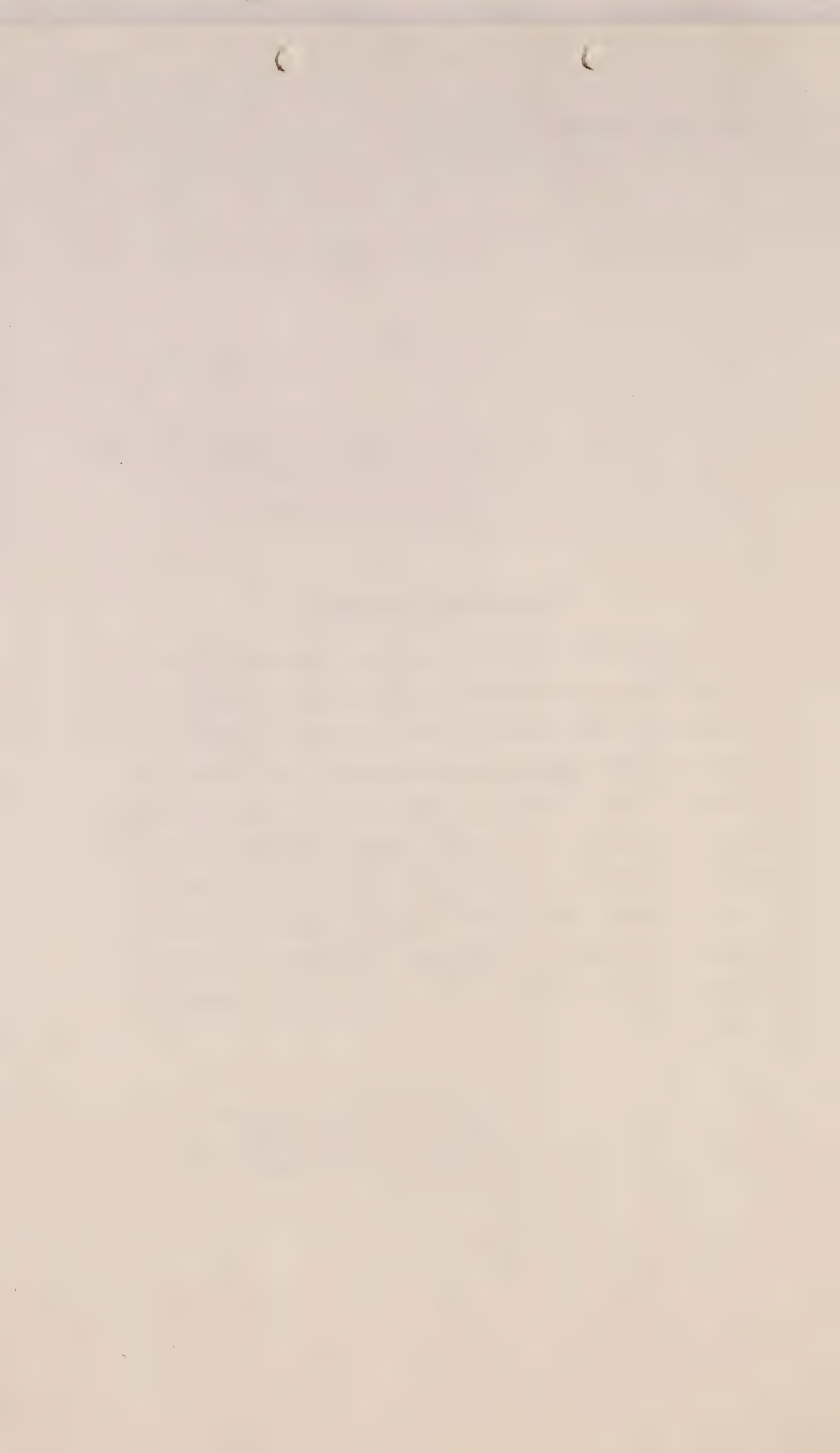

JOHN H. SUDA
Deputy Corporation Counsel, D.C.


GEORGE N. BARCLAY [#248849]
Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building - Room 318
Washington, D.C. 20004
727-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of the District of Columbia Defendants To Plaintiffs' Opposition To The Motion Of The District of Columbia Defendants For Judgment Notwithstanding The Verdict, Or In The Alternative For A New Trial Or In The Alternative, For A Remittitur, was mailed, postage prepaid to, Ann Pillsbury, Esquire, Attorney for Plaintiffs, 17 Danford Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 19 day of February, 1982.


Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building - Room 318
Washington, D.C. 20004
727-6303



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.

Plaintiffs

v.

JERRY V. WILSON, et al.

Defendants

:

:

:

:

:

:

Civil Action No. 76-1326

FILED ✓

MAR 9 1982

ORDER

JAMES F. DAVEY, Clerk

Upon consideration of the District of Columbia defendants motion for enlargement of time, and the memorandum points and authorities filed in support thereof, it is, by this Court on this 8th day of March, 1982,

ORDERED: That the District of Columbia defendants' motion for enlargement of time be, and the same is, hereby granted, and, it is,

FURTHER ORDERED: That the District of Columbia defendants shall have up to and including March 1, 1982, to complete the filing of their opposition to plaintiffs' motion for attorneys fees, including the appendix and tables.


JUDGE

cc: Ann Pillsbury, Esq.
17 Danford Street
Norway, Maine 04268

David White, Esq.
Justice Department
Washington, D.C. 20530

George N. Barclay, Esq.
Assistant Corporation Counsel, D.C.
District Building, Room 318
Washington, D.C. 20004

74



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY V. WILSON, et al. :
Defendants :

MOTION OF DISTRICT OF COLUMBIA DEFENDANTS
FOR ENLARGEMENT OF TIME IN WHICH TO
FILE OPPOSITION TO PLAINTIFFS' MOTION
FOR ATTORNEYS FEES

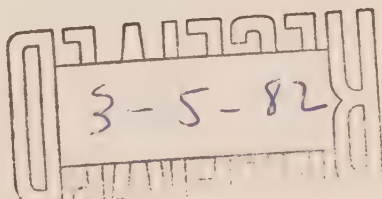
Pursuant to Rule 6(b), Federal Rule Civil Procedure, the District of Columbia defendants respectfully this Court for an enlargement of time up to and including March 1, 1982 in which to complete the filing of their opposition to plaintiffs' motion for attorneys fees.

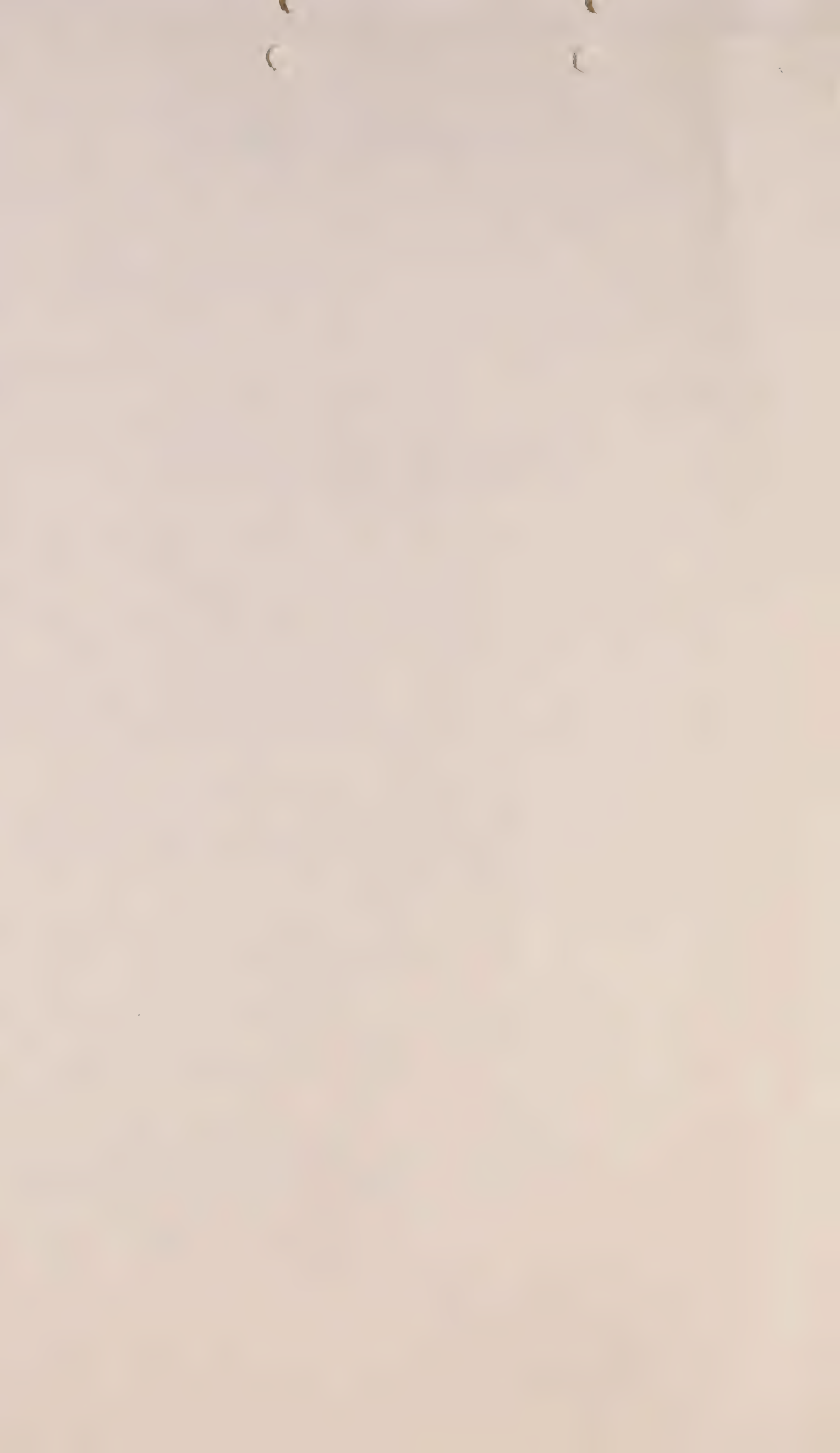
As grounds, therefore, defendants submit that the additional time is necessary to finalize and type the attached appendix and tables, which by reference are incorporated within the memorandum of Points and Authorities filed on February 26, 1982.

Judith W. Rogers
JUDITH W. ROGERS
Corporation Counsel, D.C.

John H. Suda
JOHN H. SUDA
Deputy Corporation Counsel, D.C.


George N. Barclay
GEORGE N. BARCLAY [#248849]
Assistant Corporation Counsel, D.C.
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Defendants
District Building, Room 318
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727-6303

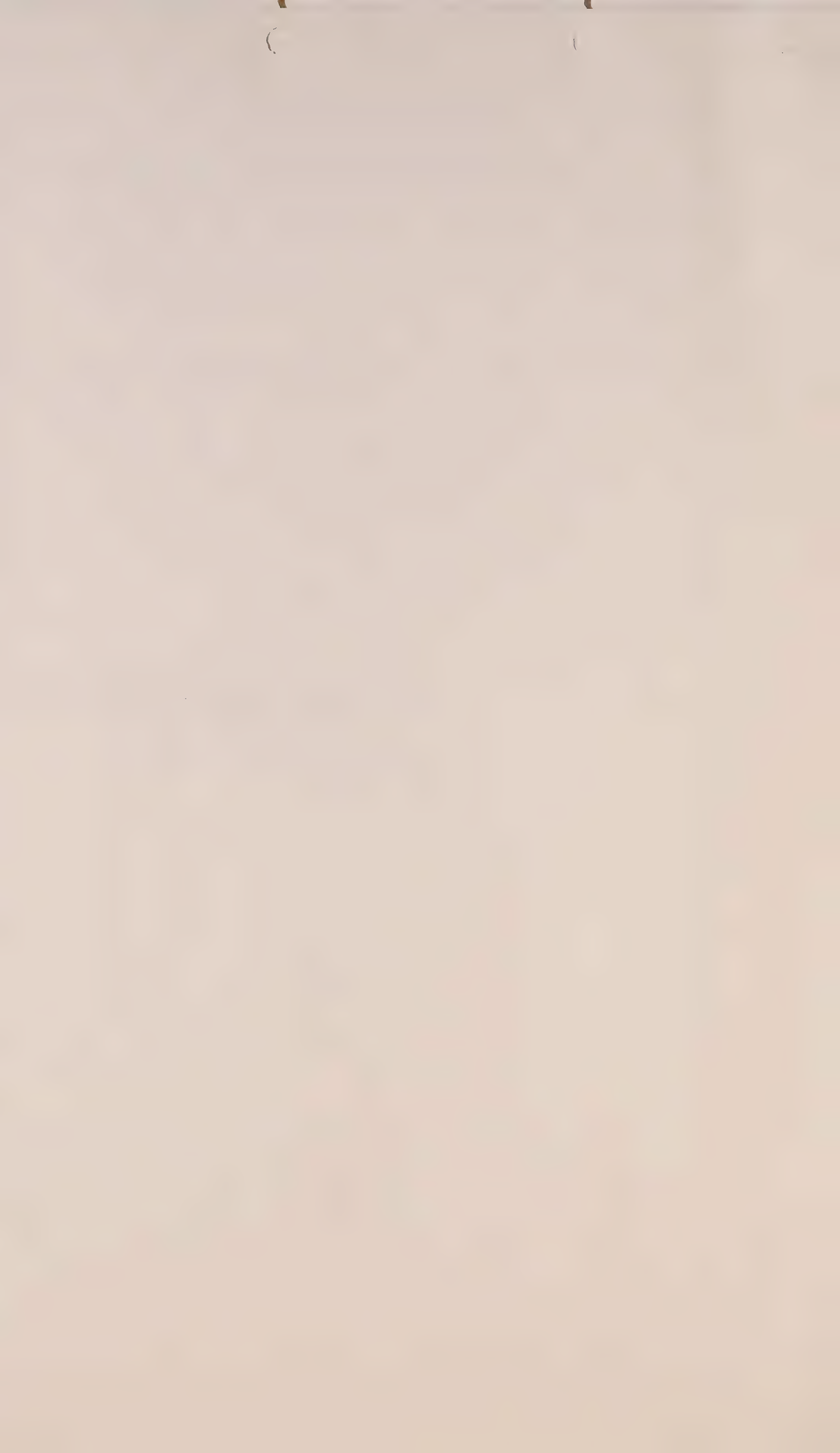




CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion of District of Columbia Defendants for Enlargement of Time in which to File Opposition to Plaintiffs' Motion for Attorneys fees, together with Memorandum of Points and Authorities in Support of District of Columbia Defendants Motion for Enlargement of Time and Order were mailed, postage prepaid, to Daniel M. Schember, Esquire, Attorney for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036; Ann Pillsbury, 17 Danford Street, Norway, Maine 04268; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 1 day of March, 1982.


Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
District Building, Room 318
Washington, D.C. 20004
727-6303



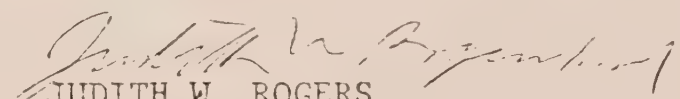
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY W. WILSON, et al. :
Defendants :

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DISTRICT
OF COLUMBIA DEFENDANTS MOTION FOR ENLARGEMENT OF TIME

On February 3, 1982, this Court ordered defendants to file their opposition to plaintiffs' motion for attorneys fees by 4:30 p.m. on February 26, 1982. At approximately 4:15 p.m. defense counsel called chambers to ask if there would be any problem in filing the opposition an hour or two after the 4:30 p.m. deadline. Since, defendants did not get a clear answer, they attempted to file their opposition by the prescribed time. Unfortunately, the opposition was mistakenly delivered to the Superior Court of the District of Columbia. Nonetheless, the opposition was filed with this Court at about 5:00 p.m. on February 26, 1982. Defendants were not, however, able to timely file the attached appendix and tables.

Since the appendix and tables will assist the court in evaluating plaintiffs' motion and since plaintiffs will not be prejudiced by the additional day, it is respectfully requested that the District of Columbia defendants be granted additional time, up to and including, March 1, 1982 in which to complete the filing of their opposition, including the appendix and tables.


JUDITH W. ROGERS
Corporation Counsel, D.C.

John H. Suda
JOHN H. SUDA
Deputy Corporation Counsel, D.C.

George N. Barclay
GEORGE N. BARCLAY
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
District Building, Room 318
Washington, D.C. 20004
727-6303

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY V. WILSON, et al. :
Defendants :

ORDER

Upon consideration of the District of Columbia defendants motion for enlargement of time, and the memorandum points and authorities filed in support thereof, it is, by this Court on this _____ day of March, 1982,

ORDERED: That the District of Columbia defendants' motion for enlargement of time be, and the same is, hereby granted, and, it is,

FURTHER ORDERED: That the District of Columbia defendants shall have up to and including March 1, 1982, to complete the filing of their opposition to plaintiffs' motion for attorneys fees, including the appendix and tables.

JUDGE

cc: Ann Pillsbury, Esq.
17 Danford Street
Norway, Maine 04268

David White, Esq.
Justice Department
Washington, D.C. 20530

George N. Barclay, Esq.
Assistant Corporation Counsel, D.C.
District Building, Room 318
Washington, D.C. 20004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY V. WILSON, et al. :
Defendants :

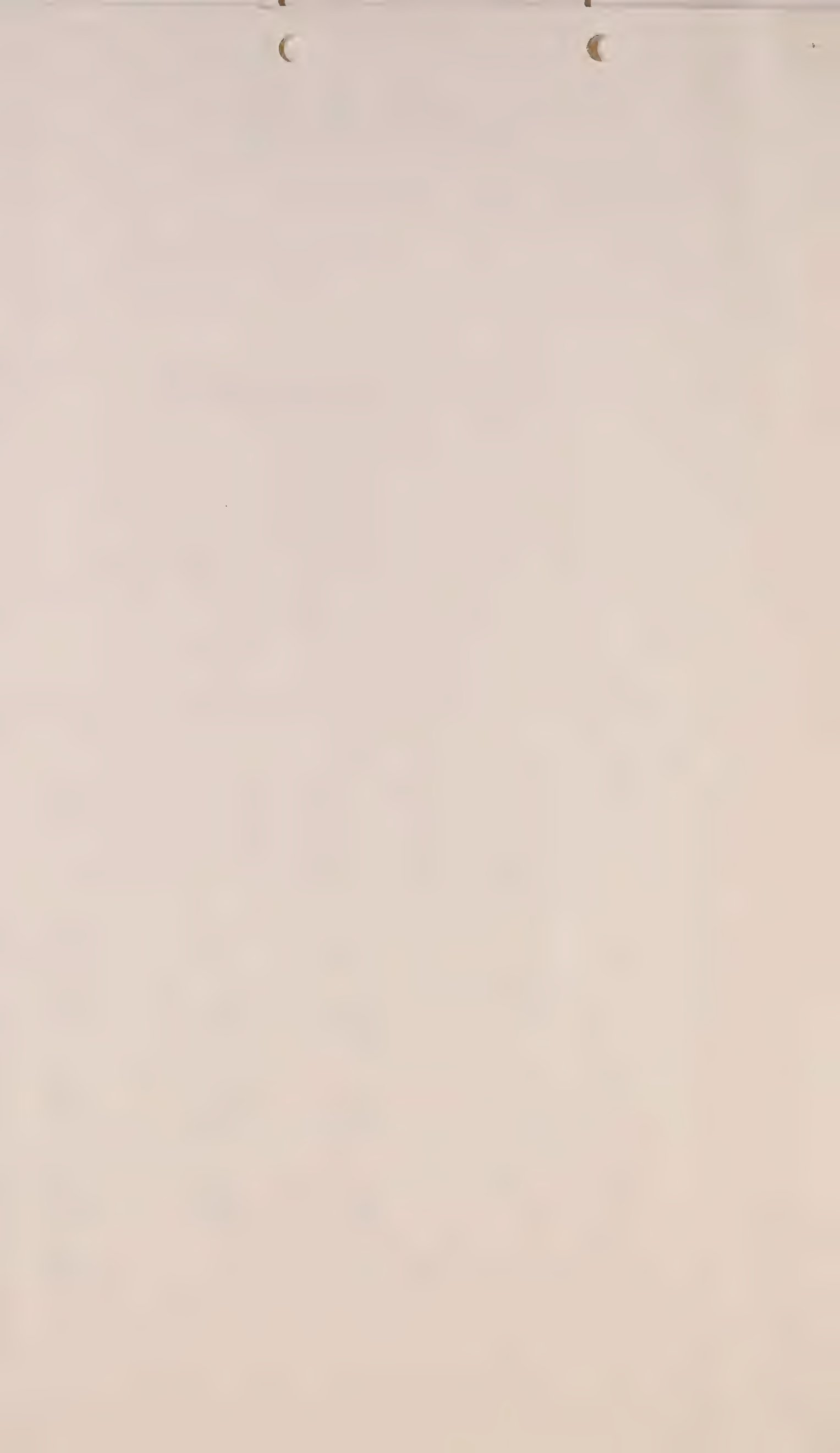
APPENDIX TO DISTRICT OF COLUMBIA DEFENDANTS
OPPOSITION TO PLAINTIFFS' MOTION
FOR ATTORNEYS FEES

This appendix contains a listing of the hours plain-
tiffs' attorneys claimed to have spent, broken down by
the following categories: District of Columbia case
(underlined), FBI case (no mark), FBI-DC case (*), clerical
work (c), duplicative work (d), and undetermined (?).

When these figures are totalled, they yield the
following results as to attorneys fees applicable to the
District of Columbia defendants (Totals and Adjustments
reflecting overcharges made for duplicative work, clerical
work, and work as to issues and defendants on which plain-
tiffs did not prevail are set forth after the breakdown
by each attorney):

<u>Schember</u>	<u>Hr.</u>	<u>\$</u>	<u>Fees Applicable to D.C.</u>
a) 1977-78 at \$60/hr.			
D.C.	.3	18	18
D.C.-FBI	42.5	2550	1275
FBI	153.5	9210	0
b) 1979-80 at \$80/hr.			
D.C.	39.2	3136	3136
D.C.-FBI	96.8	7744	3872
FBI	188.5	15080	0
c) 1981 - at \$100/hr.			
D.C.	85.8	8580	8580
D.C.-FBI	390.9	39090	19545
FBI	212.9	21290	0
Total Schember Fees Applicable to D.C.			<u>36,426</u>

3/5/82



	<u>Hr.</u>	<u>\$</u>	<u>Fees Applicable to D.C.</u>
<u>J.E. McNeil at</u>			
<u>\$60/hr.</u>			
D.C.	80	4800	4800
D.C.-FBI	400	24000	12000
FBI	238.2	14292	0
Total McNeil Fees Applicable to D.C.			<u>16,800</u>

Marks at \$60/hr.

1977-78			
D.C.	1	60	60
D.C.-FBI	57.9	3474	1737
FBI	208	12480	0
1979 - present			
D.C.	1	60	60
D.C.-FBI	2	120	60
FBI	4	240	0
Total Marks Fees Applicable to D.C.			<u>1,917</u>

Anspach at \$60/hr.

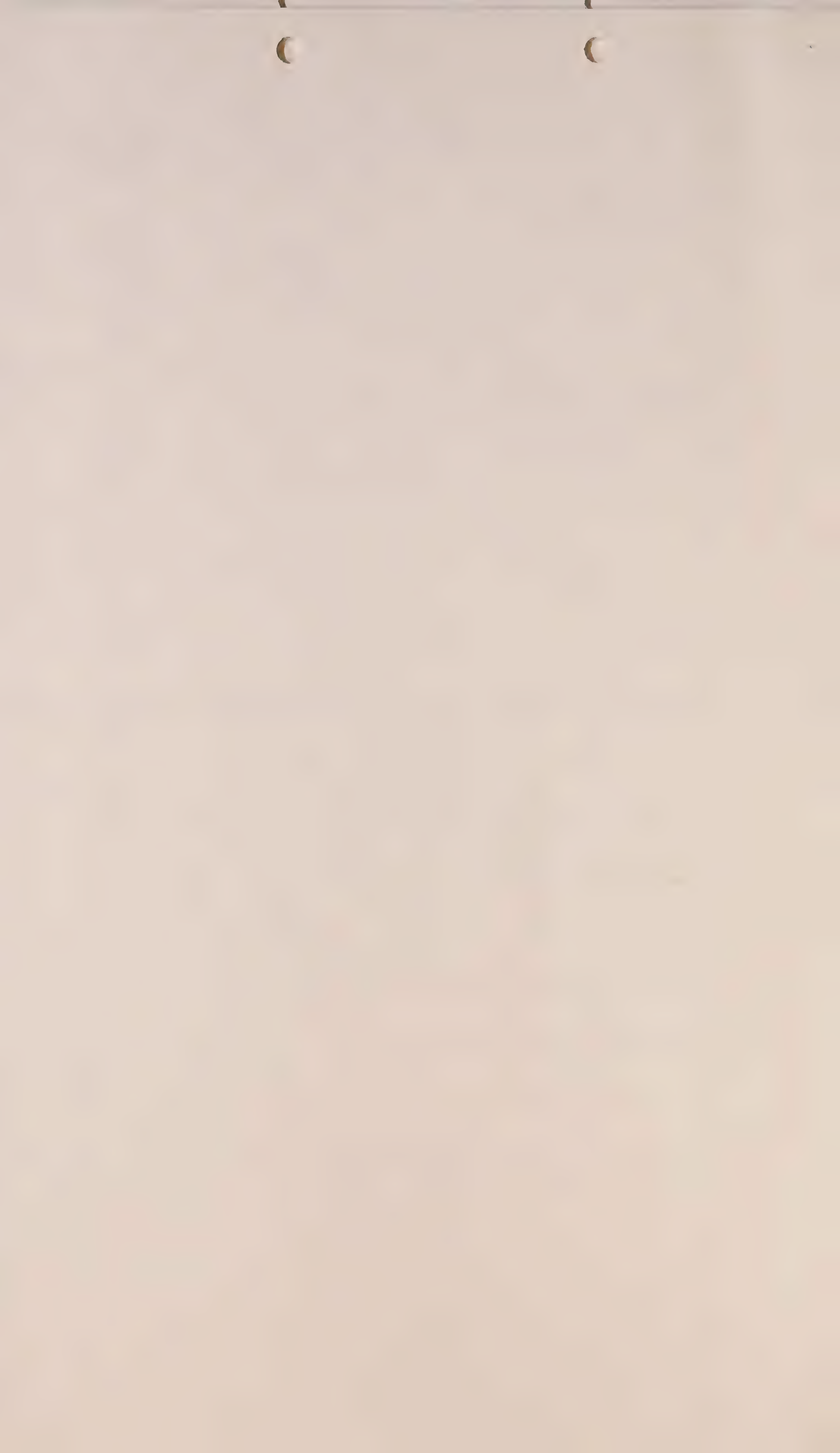
D.C.	0	0	0
D.C.-FBI	0	0	0
FBI	30.5	1830	0
Total Anspach Fees Applicable			<u>0</u>

Goffrey at \$60/hr.

D.C.	0	0	0
D.C.-FBI	7.4	426	213
FBI	81.4	4902	0
Total Goffrey Fees Applicable to D.C.			<u>213</u>

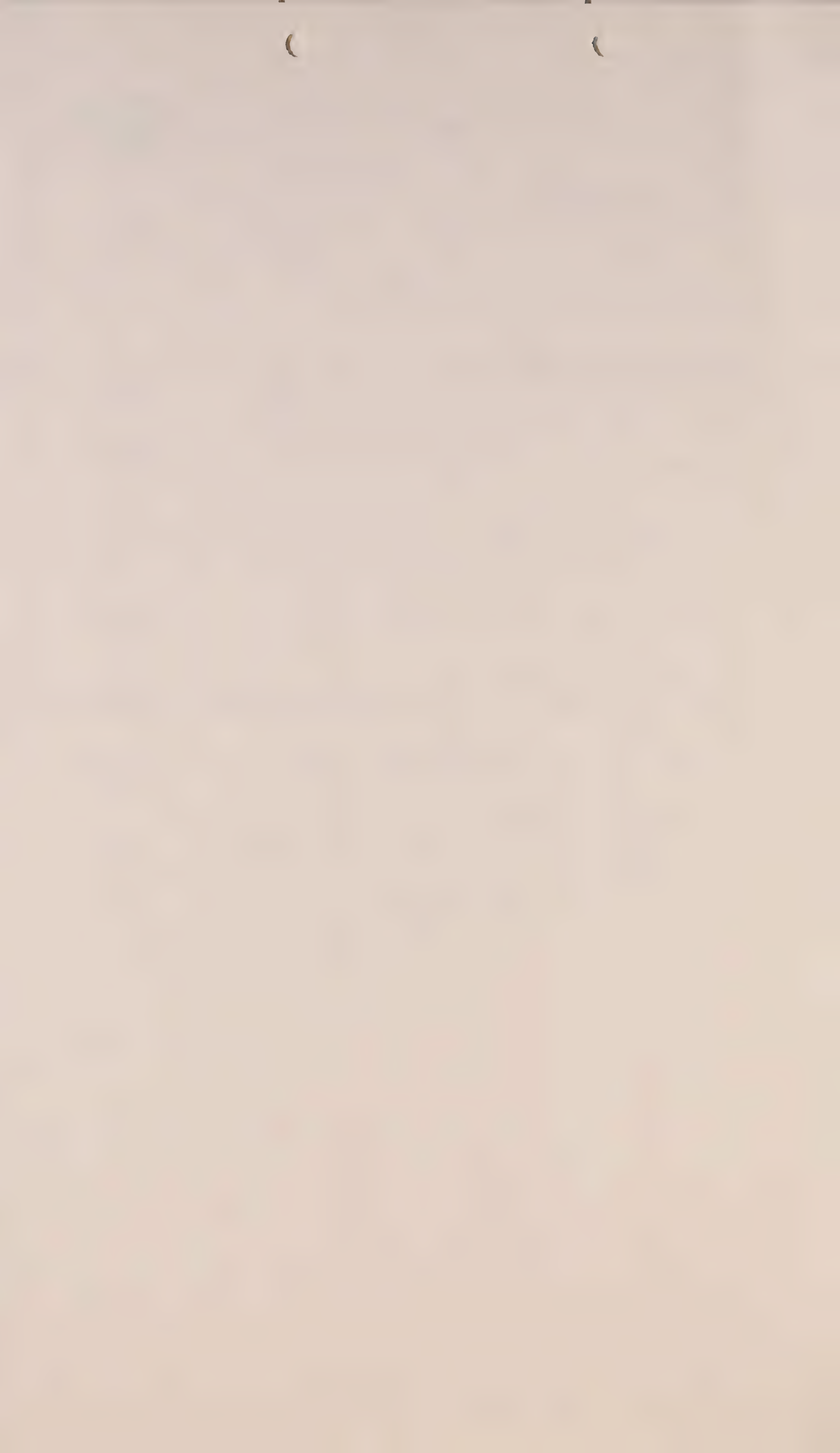
Klimaski at \$60/hr.

D.C.	0	0	0
D.C.-FBI	0	0	0
FBI	31.9	1914	0
Total Klimaski Fees Applicable to D.C.			<u>0</u>



	<u>Hr.</u>	<u>\$</u>	<u>Fees Applicable to D.C.</u>
<u>Semel at \$100/hr.</u>			
D.C.	0	0	0
D.C.-FBI	13	1300	650
FBI	16.5	1650	0
Total Semel Fees Applicable to D.C.			<u>650</u>
<u>Nerkens at \$60/hr.</u>			
D.C.	15.5	930	930
D.C.-FBI	68	4080	2040
FBI	0	0	0
Total Nerkens Fees Applicable to D.C.			<u>2,970</u>
<u>Colgan at \$60/hr.</u>			
D.C.	0	0	0
D.C.-FBI	29	1740	870
FBI	73.5	4410	0
Total Colgan Fees Applicable to D.C.			<u>870</u>
<u>Rein at \$127/hr.</u>			
D.C.	0	0	0
D.C.-FBI	127.8	15975	7987.50
FBI	0	0	0
Total Rein Fees Applicable to D.C.			<u>7987.50</u>
<u>Pillsbury</u>			
a) 1976-78 at \$60/hr.			
D.C.	21.3	1278	1278
D.C.-FBI	45.1	2706	1353
FBI	102.5	6150	0
			<u>2631</u>
b) 1981 - at \$75/hr.			
D.C.	40	3000	3000
D.C.-FBI	182.1	13657.50	6828.75
FBI	60	4500	0
			<u>9828.75</u>
c) Court time at \$100/hr.			
D.C.	0	0	0
D.C.-FBI	159	15900	7950
FBI	0	0	0
Total Pillsbury Fees Applicable to D.C.			<u>20,409.75</u>

	<u>Hr.</u>	<u>\$</u>	<u>Fees Applicable to D.C.</u>
<u>Katz at \$60/hr.</u>			
D.C.	0	0	0
D.C.-FBI	20	1200	600
FBI	24	1440	0
Total Katz Fees Applicable to D.C.			
<u>Whitaker at \$60/hr.</u>			
D.C.	0	0	0
D.C.-FBI	26.5	1590	745
FBI	24.0	1440	0
Total Whitaker Fees Applicable to D.C.			<u>745</u>
<u>Temple at \$125/hr.</u>			
D.C.	0	0	0
D.C.-FBI	82	10250	5125
FBI	0	0	0
Total Temple Fees Applicable to D.C.			<u>5125</u>
<u>Spitzer at \$75/hr.</u>			
D.C.	0	0	0
D.C.-FBI	17	1275	637.50
FBI	0	0	0
Total Spitzer Fees Applicable to D.C.			<u>637.50</u>
<u>Harris at \$60/hr.</u>			
D.C.	0	0	0
D.C.-FBI	5	300	150
FBI	0	0	0
Total Harris Fees Applicable to D.C.			<u>150</u>



Total Attorney Fees Applicable to D.C. defendants (before Reduction for excessive charges for duplication of effort, clerical work and work directed against winning defendants and on issues where defendants prevailed). 95,500.25

200.6 Clerical hours billed at \$80/hr. 16,048

196.9 duplicative hours billed at \$80/hr. 15,752

Total Clerical and duplicative 31,800

Less: Duplicative and clerical deductible regarding D.C. (i.e. 1/2 total) (15,900)

Total Attorneys Fees Applicable to D.C. defendants (before deducting for attorneys work directed against winning D.C. defendants and on issues where defendants prevailed) ----- 79,600.25

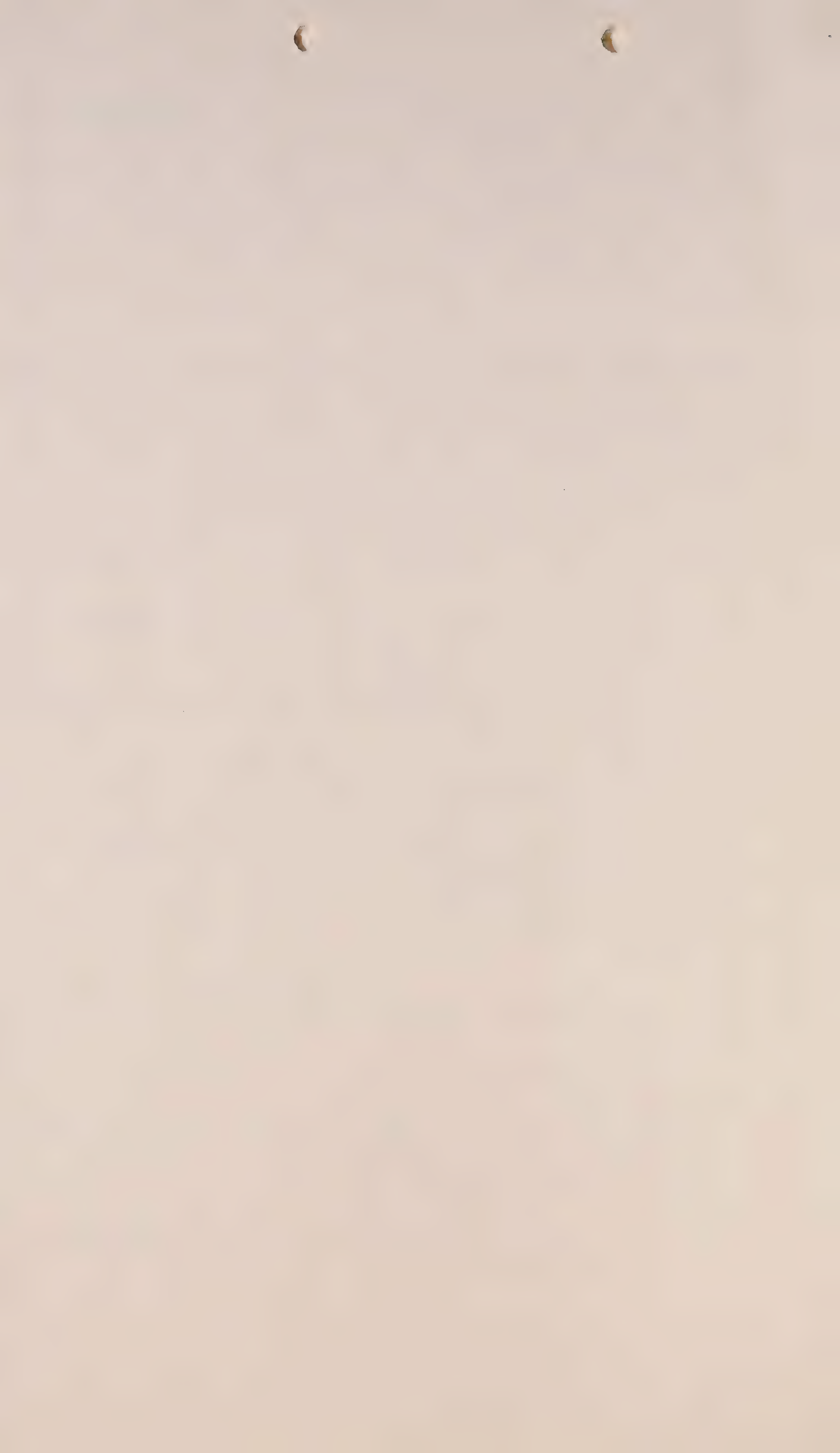
Less: 50% (since 10 of 20 D.C. defendants prevailed) (39,800.13)

Total Attorneys Fees Applicable to D.C. defendants (before deducting for attorneys work on issues where defendants prevailed) ----- 39,800.13

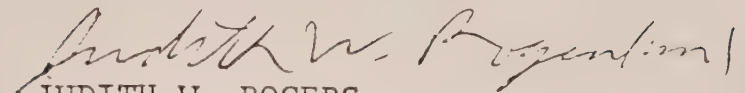
Less: 50% (for work on non-prevailing issues) (19,900.06)


(Since the plaintiffs' attorneys failed to itemize their work by issues, it is impossible to determine the amount of their work on which they did not prevail. Therefore, defendants assume a 50% factor for these issues.)


Total Attorneys fee applicable to D.C. defendants ----- 19,900.06



Respectfully submitted

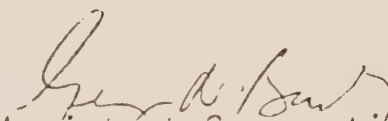

JUDITH W. ROGERS
Corporation Counsel, D.C.

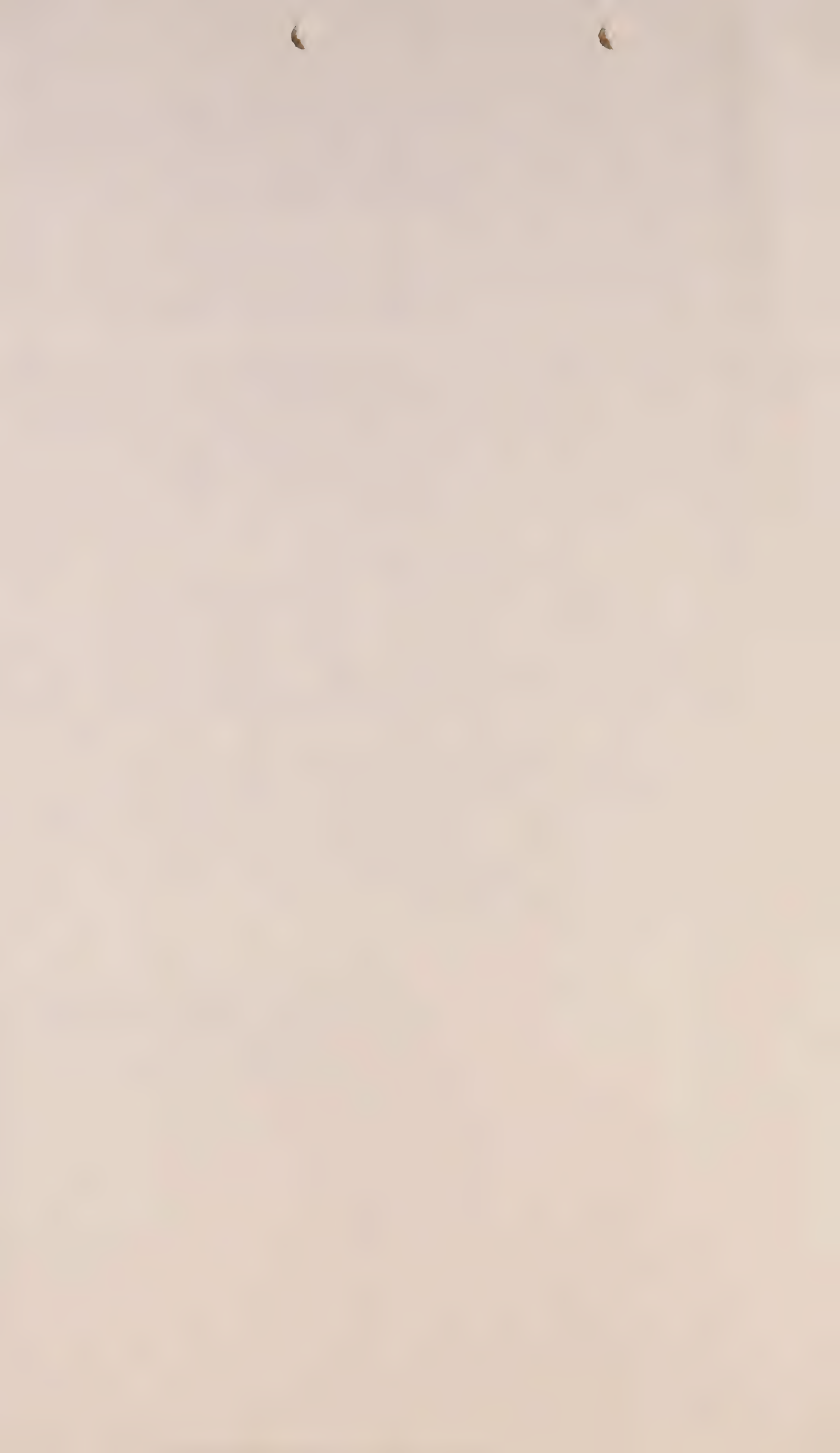

JOHN H. SUDA
Deputy Corporation Counsel, D.C.


GEORGE N. BARCLAY
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
District Building, Room 318
Washington, D.C. 20004
727-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
Appendix to District of Columbia Defendants Opposition to
Plaintiffs' Motion for Attorneys Fees was mailed, postage
prepaid, to Daniel M. Schember, Esquire, Attorney for
Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036;
Ann Pillsbury, 17 Danford Street, Norway, Maine 04268;
and David White, Esquire, Attorney fo- Federal Defendants,
Department of Justice, Washington, D.C. 20530, this
 1 day of March, 1982.


Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
District Building, Room 318
Washington, D.C. 20004
727-6303



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :
Plaintiffs :
v. : Civil Action No. 76-1326
JERRY W. WILSON, et al. :
Defendants :

ORDER

Upon consideration of Plaintiffs' Motion for Attorneys Fees, the opposition of the District of Columbia defendants thereto and the entire record herein, it is, by the Court on this _____ day of _____, 1982,

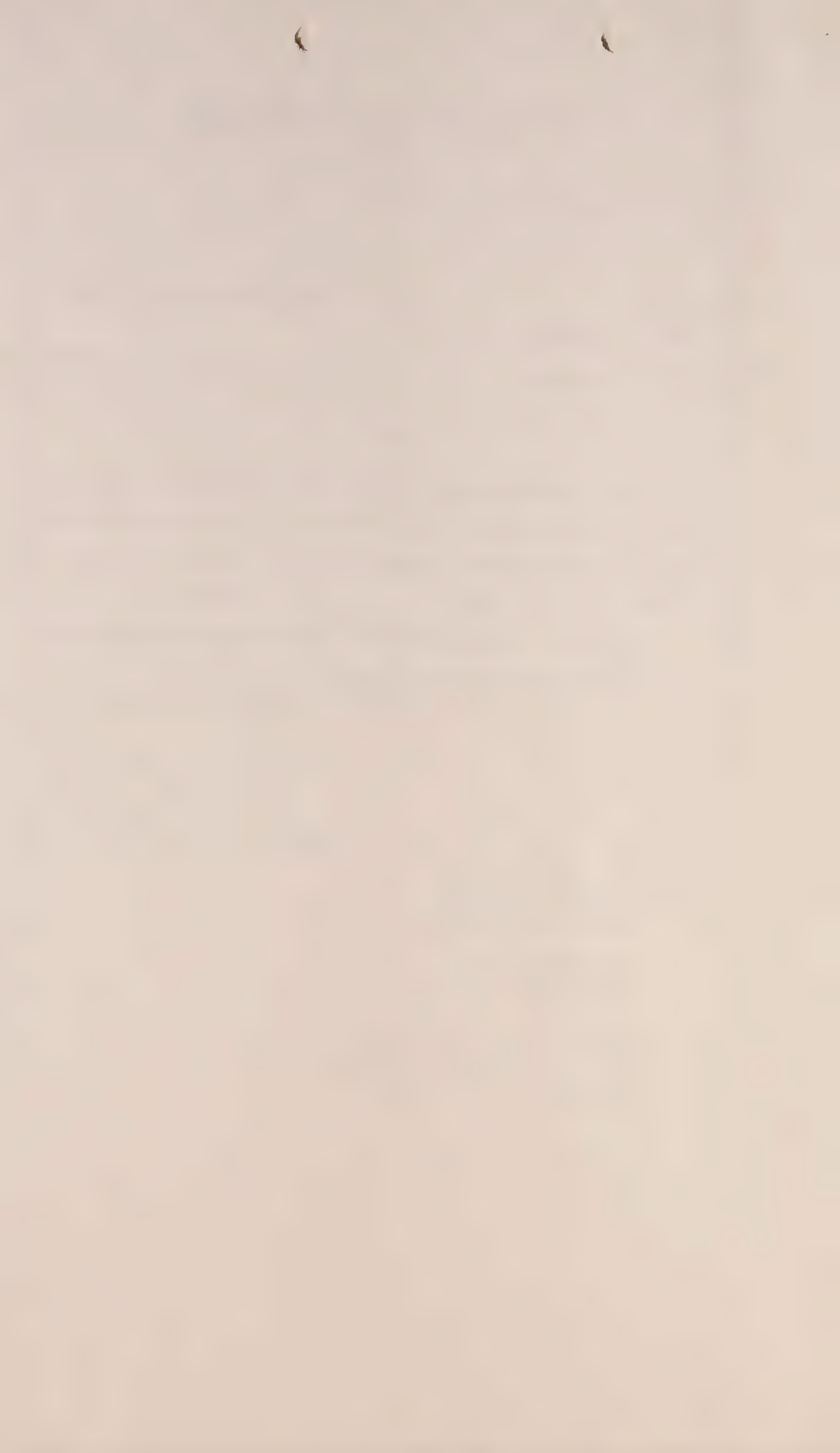
ORDERED: That plaintiffs' Motion for Attorneys Fees be, and the same is hereby denied.

JUDGE

cc: Ann Pillsbury, Esq.
17 Danford Street
Norway, Maine 04268

David White, Esq.
Justice Department
Washington, D.C. 20530

George N. Barclay, Esq.
Assistant Corporation Counsel, D.C.
District Building, Room 318
Washington, D.C. 20004



UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
	)	Civil Action
v.)	
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

MOTION BY FEDERAL DEFENDANTS FOR
ENLARGEMENT OF TIME AND FOR
BIFURCATION OF PROCEEDINGS
RELATING TO ATTORNEYS' FEES


Defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerald T. Grimaldi, and Gerould W. Pangburn, through their undersigned counsel and pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, move for an enlargement of time to and including March 12, 1982, in which to respond to plaintiffs' motion for award of attorneys' fees. In addition, the federal defendants move for bifurcation of the attorneys' fees issue, first to litigate whether attorneys' fees are appropriate and then to determine how payment of any award should be apportioned among the defendants.

In support of this motion the federal defendants rely upon the attached memorandum of points and authorities.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney


BROOK HEDGE


DAVID H. WHITE

Attorneys, Department of Justice
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for Defendants Brennan,
Moore, Jones, Grimaldi, and
Pangburn

Rec'd. 3/1/82

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
	)	Civil Action
v.)	
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION BY FEDERAL DEFENDANTS
FOR ENLARGEMENT OF TIME AND FOR BIFURCATION
OF PROCEEDINGS RELATING TO ATTORNEYS' FEES

Plaintiffs have filed their motion requesting recovery from defendants of \$500,000 in attorneys' fees. This Court has ordered that defendants respond to the motion by February 26, 1982.

The federal defendants now request an additional enlargement of time to and including March 12, 1982, in which to file their opposition. In addition, federal defendants request that the Court undertake to resolve the attorneys' fees issue in two stages. The first stage would be the consideration of whether attorneys' fees may appropriately be awarded to plaintiffs and, if so, in what amount. If this issue is resolved in favor of plaintiffs, the second stage would be the determination of how responsibility to pay the award should be apportioned among the defendants. In addition, the second stage of the proceedings may include consideration of whether the United States should be liable for any portion of the attorneys' fee award.

Federal defendants have been delayed in the preparation of their opposition to plaintiffs' motion because their counsel, the Department of Justice, has detected, and has attempted to resolve, a potential conflict between the interests of the federal defendants and the policies of the Department of Justice. The potential conflict involves primarily the issue of whether the United States could be made to assume liability to pay any attorneys' fees award made against the federal defendants.

The recently enacted Equal Access to Justice Act, Public Law 96-481, 94 Stat. 2325, greatly expands the circumstances in which

the United States may be held liable for attorneys' fees. Among other things, the Act amended 28 U.S.C. § 2412 so that it now provides "[A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action by or against . . . any official of the United States acting in his or her official capacity. . . ." 28 U.S.C. § 2412(b).

On the basis of this statute, the federal defendants have a plausible argument that the United States rather than they, individually and personally, should pay any attorneys' fees awarded to plaintiffs; however, the policy of the Department of Justice is that the language quoted above does not impose liability on the United States for attorneys' fees in civil actions, such as this one, brought against federal employees under the principles enunciated in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). In other words, the Department of Justice, as counsel for the federal defendants, is precluded from presenting an argument which could be made in their behalf.

A potential conflict also exists among the federal defendants themselves. Each of them will desire to reduce his own liability for attorneys' fees and thus, perhaps, increase the liability of the others. It would therefore be inappropriate for all to be represented by the same counsel.

These conflicts relate only to the apportionment of any award of attorneys' fees. There appears to be no conflict inherent in the Department of Justice arguing that attorneys' fees are not appropriate or that the demand is excessive. As a consequence of this circumstance, the federal defendants request a two-stage consideration of the attorneys' fee issue. Should the second stage be necessary, the federal defendants may desire to retain other counsel.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

Brook Hedge
BROOK HEDGE

David H. White
DAVID H. WHITE

Attorneys, Department of Justice
9th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-4269

Attorneys for Defendants Brennan,
Moore, Jones, Grimald, and
Pangburn

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,)	
)	
Plaintiffs,)	
	)	Civil Action
v.)	
	)	No. 76-1326
JERRY WILSON, et al.,)	
)	
Defendants.)	

ORDER

This cause having come before the Court on motion by the federal defendants for an enlargement of time to and including March 12, 1982, within which to reply to plaintiffs' motion for attorneys' fees and for bifurcation of proceedings relating to attorneys' fees, and the Court being fully advised in the premises, it is this ____ day of _____, 1982,

ORDERED that the motion for enlargement of time to and including March 12, 1982, within which federal defendants may respond to plaintiffs' motion for attorneys' fees, be, and hereby is, granted; and it is further

ORDERED that the attorneys' fee issue will be resolved in two stages, with the Court addressing first whether attorneys' fees should be awarded and in what amount, and addressing second how payment of the award should be apportioned among the defendants.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

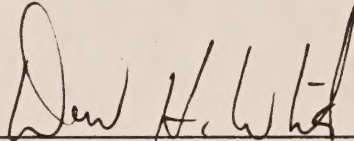
I hereby certify on this 26th day of February, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Motion by Federal Defendants for an Enlargement of Time and for Bifurcation of Proceedings Relating to Attorneys' Fees, with accompanying memorandum and proposed Order.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
1624 Crescent Place, N.W.
Washington, D.C. 20009

Anne Pilsbury, Esquire
17 Danforth Street
Norway, Maine 04268

Laura Bonn, Esquire
Assistant Corporation Counsel
District Building
14th and E Street, N.W.
Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
1712 N Streets, N.W.
Washington, D.C. 20036



DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C.

EXHIBIT A

The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

John Doe, 1234 Main Street, New York, N.Y. 10001
Jane Smith, 5678 Elm Street, New York, N.Y. 10002
Robert Johnson, 9010 Oak Street, New York, N.Y. 10003

John Doe, 1234 Main Street, New York, N.Y. 10001
Jane Smith, 5678 Elm Street, New York, N.Y. 10002
Robert Johnson, 9010 Oak Street, New York, N.Y. 10003

John Doe, 1234 Main Street, New York, N.Y. 10001
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